

STATE REGULATION OF PROPERTY AND CASUALTY INSURANCE RATES

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The author presents an exhaustive analysis of rate control in property and casualty insurance, molding the data to predict future regulatory patterns and offering guidance which may serve the needs of the insurers, the public, and the state and federal governments.

I. INTRODUCTION

Insurance regulation is an enormous subject. It involves such diverse matters as licensing agents, approving policy forms, regulating investments, conducting examinations of companies' financial records, and policing reserve requirements. This analysis focuses on one aspect of insurance regulation: the control of rates charged for property and casualty insurance, with particular emphasis upon fire, extended coverage, and allied lines of insurance. This area of regulation is important, not only because it affects all business firms and nearly all households in the United States, but also because rate regulation has been the subject of considerable controversy in recent years.

In 1966, premiums written by approximately 1,220 property and casualty companies totaled over twenty and two-tenths billion dollars. Property and casualty insurance includes a variety of forms but two groups of insurance accounted for a major portion of the business. In 1966, ten billion dollars was paid in premiums for automobile insurance, which includes automobile injury liability, automobile property damage, and automobile physical damage. Two and two-tenths billion dollars was paid for fire, extended coverage, and allied lines insurance, which includes losses caused by fire and lightning, damage resulting from smoke and water, damage caused by windstorm, hail, explosion or riot, and such perils as sprinkler leakage and earthquakes. Two and four-tenths billion dollars was paid for multiple peril insurance, which includes package policies covering numerous kinds of property and casualty lines for homeowners and businesses, previously covered by individual policies. Two and five-tenths billion dollars was paid for workmen's compensation insurance, which is not considered in this study since many states provide this insurance, rather than private insurers. One and two-tenths billion dollars was paid for miscellaneous

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bodily injury and property damage liability coverage such as products liability insurance and professional malpractice insurance. Five hundred million dollars was paid for inland marine insurance, which refers to various coverages for property being transported from one place to another, other than by ocean transit. Other forms of property and casualty insurance include ocean marine, crop-hail, boiler and machinery, and glass insurance, but each of these lines generates a relatively small premium volume each year.¹

It is convenient to think of property and casualty insurance as a separate industry since virtually all lines of insurance in this industry share common problems concerning regulatory rules and rate making practices. Fire, extended coverage, and allied lines insurance is particularly suitable for analysis since this coverage has had the longest history of regulation in the United States and has recently merged to some extent with another type of insurance of recent development, the multiple peril line.

Within such setting this analysis is concerned with the public control of price competition through rate regulation. Among the facets of the subject considered are the historical development and structure of the instruments of control and the problems involved in effecting such control. The central purpose is to identify the reasons for rate regulation and to analyze the fundamental issues involved.

II. THE FOUNDATIONS OF STATE REGULATION OF INSURANCE

From 1868 to 1944 it was generally believed that insurance was not commerce and was therefore immune from federal regulation. This notion originated with *Paul v. Virginia*,² which involved a Virginia insurance agent who represented several New York fire insurance companies. The agent refused to comply with the Virginia law which required a deposit of bonds with the state treasurer from agents representing out-of-state companies. Nevertheless, the agent issued an insurance policy and was fined for acting without a license.³ On appeal, Mr. Justice Field said, writing for a unanimous Court:

Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity [sic] against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word . . . Such contracts are not inter-state transactions, though the parties may be domiciled

¹ 1967 Spectator Property, Liability Insurance Index 3.

² 75 U.S. (8 Wall.) 168 (1868).

³ For the events leading up to and analysis of *Paul v. Virginia*, see Nehemkis, "Paul v. Virginia: The Need for Re-examination," 27 Geo. L.J. 519, 526-33 (1939).

in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.⁴

The Court's finding that the business of insurance was not commerce, although sweeping and subject to considerable criticism, was rigidly adhered to in a number of subsequent cases.

In *Hooper v. California*⁵ an insurance agent was convicted for failing to file a bond required by a California statute before writing insurance on behalf of a company not incorporated in that state. The agent claimed that the contract, being one for ocean marine insurance, was a matter of interstate commerce and as such was beyond the reach of state authority. The Court rejected this contention and held:

This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul v. Virginia*

Whilst it is true that in *Paul v. Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce.⁶

Although in the *Paul* case the Court had said that "issuing a policy of insurance is not a transaction of commerce," in *Hooper* the Court declared that "The business of insurance is not commerce."⁷

One of the more important cases involving the extent of state control was presented in *New York Life Ins. Co. v. Deer Lodge County*.⁸ It was asserted that a tax levied by a Montana county on certain assets of an insurer was "illegal, unlawful and void for that . . . said tax and the levy and collection thereof was and is a burden upon interstate commerce"⁹ The majority opinion of the Court, advertng to the earlier decisions regarding whether insurance was in interstate commerce, said that these constituted a formidable body of authority and strongly invoked the sanction of the rule of stare decisis.

⁴ 75 U.S. (8 Wall.) at 183.

⁵ 155 U.S. 648 (1895).

⁶ *Id.* at 653.

⁷ *Id.* at 655.

⁸ 231 U.S. 495 (1913).

⁹ *Id.* at 499.

To reverse these cases, said the Court, would require it to promulgate a new rule of constitutional inhibition upon the states and would compel a change in their policy and a readjustment of their laws. Such a result moved the Court not to change its position.¹⁰

The majority were of the opinion that the rationale of *Paul v. Virginia* was exhaustive of the general principle and that "it would rack ingenuity to attempt to vary its expression or more aptly illustrate it."¹¹ The Court was not impressed by the volume of business and its geographical extent; nor, said the Court, did the intrastate character of the contracts change by their numbers or the residences of the parties. All the decisions pertaining to New York Life were rendered in New York. Its Montana agent was authorized to receive applications for insurance solely for the purpose of transmitting them to the home office. Thus, the use of the United States mails was essential to practically every step in the transaction of its business. The company's argument that the use of the mails constituted a "current of commerce among the states" failed to persuade the Court to alter the established view, for the reason that "This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character."¹²

In all these cases in which the Supreme Court held that insurance was not commerce, the argument on behalf of the contrary view was advanced by an insurance company or agent to establish the principle

¹⁰ *Id.* at 502.

¹¹ *Id.* at 508. This was the view of Mr. Justice Jackson dissenting in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) [hereinafter referred to as *SEUA*], discussed in detail in section IV *infra*.

Cf. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928), where Mr. Justice Holmes, dissenting, referred to *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and said: "If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." Ten years later the Court overruled *Swift v. Tyson* which had been hallowed by almost a century of existence. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹² *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 509 (1913). The three cases mentioned were the most significant in establishing the principle that insurance was not commerce, although there were several others in which the Court reiterated the same conclusion: *Colgate v. Harvey*, 296 U.S. 404, 432 (1935); *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274, 276-77 (1927); *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, 75 (1922); *Northwestern Mut. Life Ins. Co. v. Wisconsin*, 247 U.S. 132 (1918); *Nutting v. Massachusetts*, 183 U.S. 553 (1902); *New York Life Ins. Co. v. Cravens*, 178 U.S. 389, 401 (1900); *Orient Ins. Co. v. Daggs*, 172 U.S. 557 (1899); *Noble v. Mitchell*, 164 U.S. 367, 370 (1896); *Philadelphia Fire Ass'n v. New York*, 119 U.S. 110, 118 (1886); *Liverpool Ins. Co. v. Massachusetts*, 77 U.S. (10 Wall.) 566, 573 (1870); *Ducat v. Chicago*, 77 U.S. (10 Wall.) 410, 415 (1870).

that insurance was not only commerce, but interstate commerce, and was therefore not subject to state regulation. As noted in section IV *infra*, in the early 1940's the insurance industry reversed its position and argued that its activities were not in interstate commerce and therefore were not subject to federal regulation.

A. Attempts to Legislate Federal Control

The industry sought relief through federal legislation to supplant existing state schemes. In 1866 and 1868 bills were introduced in Congress to create a national bureau of insurance.¹³ These bills resulted from the irritation of the insurance companies from what they regarded as burdensome and unnecessary multitudinous state regulatory and tax legislation.¹⁴ Having failed to gain federal legislation, the insurance industry then attempted to attack state regulation and taxation in the courts. *Paul v. Virginia* was the first test case.

After the Supreme Court's decision in *Hooper v. California*,¹⁵ bills were again introduced in the Senate and House for the purpose of creating a national bureau of insurance and declaring that insurance companies doing business outside the state of their incorporation were deemed to be engaged in interstate commerce. None of these bills became law.¹⁶

In 1905 President Roosevelt requested that Congress consider whether the power of the Bureau of Corporations could not be extended to cover interstate insurance transactions, but the Senate and House Committees on the Judiciary declined to recommend legislation on the theory that Congress had no power to regulate insurance.¹⁷ The House committee stated that Congress was powerless to act since the Supreme Court had held many times that insurance was not commerce.¹⁸

Subsequent to the Supreme Court's decision in *New York Life Ins. Co. v. Deer Lodge County*,¹⁹ resolutions were introduced in the Senate and the House, proposing a constitutional amendment to permit Congress to regulate the insurance business,²⁰ but these resolutions failed

¹³ S. 299, 40th Cong., 2d Sess. (1868); H.R. 738, 39th Cong., 1st Sess. (1866).

¹⁴ Nehemkis, *supra* note 3, at 523-26.

¹⁵ 155 U.S. 648 (1895).

¹⁶ H.R. 15092, 59th Cong., 1st Sess. (1906); S. 7277, 58th Cong., 3d Sess. (1904); H.R. 16274, 58th Cong., 3d Sess. (1904); H.R. 7054, 58th Cong., 2d Sess. (1903); H.R. 13791, 58th Cong., 2d Sess. (1904); S. 2736, 55th Cong., 2d Sess. (1897).

¹⁷ S. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep. No. 2491, 59th Cong., 1st Sess. (1906).

¹⁸ See *SEUA*, 322 U.S. 533, 575 (1944).

¹⁹ 231 U.S. 495 (1913).

²⁰ S.J. Res. 58, 64th Cong., 1st Sess. (1915); S.J. Res. 103, 63d Cong., 2d Sess. (1914); H.R.J. Res. 194, 63d Cong., 2d Sess. (1914).

to come out of committee. In 1933, a similar resolution was introduced and also died in committee.²¹ For the next decade the industry seemed resigned to state regulation and taxation since no further proposals were made to effect federal control.

These legislative proposals prompted one writer to comment that the insurance industry's enthusiasm for federal regulation in the late 1800's and early 1900's was probably because the industry

considered it more advantageous to be regulated by a toothless, laissez-fairish mastiff like the Federal Government than by those smaller but possibly more harassing watch dogs, the individual states.²²

As to the complete change of position of the industry following the Supreme Court's decision in 1944,²³ holding that insurance was in interstate commerce (this decision is discussed in section IV *infra*), the same commentator remarked:

Perhaps, subsequently, some of the insurance industry's chagrin at vexatious and repetitious state regulation . . . [was] supplanted by a fear that the indolent federal mastiff . . . [had] cut its wisdom teeth and . . . [was] threatening to impose regulation of unknown effectiveness.²⁴

B. *Marine Insurance Exception*

While in the late 1800's and early 1900's the Supreme Court adhered to the concept that the insurance business was not interstate commerce, the Court in *Thames & Mersey Marine Ins. Co., Ltd. v. United States*²⁵ suggested that contractual relations which are essential to interstate commerce should be brought within the definition of such a concept. This case involved a corporation, engaged in the ocean marine insurance business, which was taxed under the War Revenue Act of 1898.²⁶ The tax was assailed by the company as being in substance a tax upon exportation and hence invalid. Although in two earlier cases²⁷ the Court unequivocally held that ocean marine insurance was not in interstate commerce, in *Thames & Mersey Marine Ins. Co.* it modified this, saying:

Let it be assumed, as this Court has said, that the insurance

²¹ S.J. Res. 51, 73d Cong., 1st Sess. (1933).

²² Timberg, "Insurance and Interstate Commerce," 50 Yale L.J. 959, 969 n.42 (1941).

²³ *SEUA*, 322 U.S. 533 (1944).

²⁴ Timberg, *supra* note 22.

²⁵ 237 U.S. 19 (1915).

²⁶ Ch. 448, 30 Stat. 448 (1898).

²⁷ *Nutting v. Massachusetts*, 183 U.S. 553 (1902); *Hooper v. California*, 155 U.S. 648 (1895).

business, generically considered, is not commerce; that the contract of insurance is a personal contract The inquiry still remains whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon the exportation itself It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation; the business of the world is conducted upon this basis.²⁸

For this reason the Court declared invalid the federal stamp tax on ocean marine insurance policies. As a result of the decision, members of the marine insurance industry feared that they might be subject to the federal antitrust laws on the theory that the decision brought insurance within the proscriptions of the Sherman Act.²⁹

The ocean marine insurance industry persuaded Congress that the implications of the case were serious enough that Congress should grant the industry an exemption from the antitrust laws, although prior efforts of the insurance industry to have the federal government exercise jurisdiction over insurance had failed. Undoubtedly Congress was more amenable to consider the problems of the ocean marine industry since immediately after World War I Congress was eager to develop a strong American merchant marine fleet. Thus, in 1920, the first insurance exemption from the federal antitrust laws was granted in the Merchant Marine Act of 1920. Section 885(b)³⁰ of the act provides:

Nothing contained in the "antitrust laws" . . . shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: To transact a marine insurance and reinsurance business . . . and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of the component members.

In granting the exemption, Congress relied on what it thought were unique characteristics of ocean marine insurance. In a report just prior to the passage of the Merchant Marine Act, a House subcommittee stated that marine insurance was more than a fundamental agency of commerce since its importance extended beyond the ordinary service of protecting property and credit. Insurance has a use as a competitive weapon in international trade and therefore the advantages of possessing strong, independent underwriting facilities were considered undeniable. The subcommittee went on to note that serious legislative burdens and restrictions confronted American companies; these burdens and

²⁸ 237 U.S. 19, 25-26.

²⁹ See discussion in S. Rep. No. 1834, 86th Cong., 2d Sess. 64-69 (1960).

³⁰ 46 U.S.C. § 885(b) (1958), ch. 250, § 29, 41 Stat. 1000 (1920).

restrictions were regarded as unnecessary and largely traceable to a shortsighted policy, dictated by local desires, which viewed marine insurance as a purely state matter rather than as a national institution. The remedy to the problem was to be found in (1) self-help on the part of American companies through cooperative action, especially in the formation of a comprehensive insurance bureau for reinsurance purposes, (2) federal assistance, and (3) state help through the removal of legislative restrictions which prohibited rate combinations. Federal legislation was recommended to assure marine underwriters of the legality of combinations designed to facilitate reinsurance or to extend underwriting activities to foreign countries. Such legislation was deemed necessary since a number of underwriters told the subcommittee that they feared the legal consequences that might attach to the creation of such associations or combinations. Thus the subcommittee concluded: "[I]t will be advisable, and even if unnecessary can do no harm, to free all such co-operative efforts from the possible operation of the Sherman and Clayton Anti-trust Acts."³¹

Whether the exemption was wise is questionable. In 1959, hearings on the ocean marine insurance industry were conducted by the Senate Subcommittee on Antitrust and Monopoly. In its findings and conclusions the subcommittee expressed great concern (1) that after forty years under the Merchant Marine Act only a single syndicate existed with a virtual monopoly on hull insurance business underwritten in the United States; (2) that the agreements under which that syndicate operates restrict freedom of entry into the business and discourage price competition; (3) that such restrictions possibly constitute boycott, coercion, or intimidation, which are not within the protection of the exemption; (4) that although the FTC investigated the industry between 1950 and 1956, it was dilatory in its study and failed to refer to the Department of Justice evidence elicited indicating possible Sherman Act violations; and (5) that the Federal Maritime Board (charged with the responsibility of creating a national independent marine insurance business) also had been remiss in its duties.³²

III. DEVELOPMENT OF STATE INSURANCE RATE REGULATION: 1800's—1944

Under the umbrella of exclusive state regulation of insurance, detailed laws were enacted in every state in the 1800's and early 1900's to protect the public from various problems and practices of insurance companies. There were laws to protect policyholders against loss

³¹ Quoted in S. Huebner, *Marine Insurance* 203-08 (1920).

³² S. Rep. No. 1834, 86th Cong., 2d Sess. 107-08 (1960).

through insolvency of insurers and laws dealing with the policy forms companies could use. Long and extremely detailed annual statements covering insurers' businesses during the year, and year-end financial statements, were required to be filed with the state insurance departments. Most states provided for the licensing of insurance agents and brokers. Every state had an insurance department to supervise the business of insurance.³³ In contrast to these methods of state regulation, rate regulation is of more recent origin. In 1927, Professor Patterson described it as "embryonic";³⁴ even after thirty more years he said that it was much less sophisticated and thorough than public utility rate regulation.³⁵

A. Fire Insurance

Until the mid-1800's insurance practices were virtually free of government control in the United States. In 1850 the first state insurance commissioner was appointed and shortly thereafter several other states established administrative offices to oversee insurance practices.³⁶ But state control was ineffective in remedying the problems surrounding the boom-or-bust business cycle in the fire insurance industry. When losses were low and profits handsome, new companies entered the market. No artificially imposed barriers impeded entry and no substantial economies of scale existed to discourage entrants. As a result of the vigorous, unimpeded competition in the 1800's, premiums failed to cover operating costs and by 1877 approximately 3,000 companies had failed. Motivated by the desire to survive and prosper, in 1866 companies organized The National Board of Fire Underwriters "to establish and maintain, as far as practicable, a system of uniform rates of premium."³⁷ Although The National Board of Fire Underwriters was rather ineffective in stabilizing rates, the late 1800's marked the development of a structure for concerted rate making which remains substantially intact today. The National Board of Fire Underwriters gradually shifted its energies to fire prevention and statistical compila-

³³ See Brook, "Public Interest and the Commissioners'—All Industry Laws," 15 Law & Contemp. Prob. 606 (1950). See also E. Patterson, *The Insurance Commissioner in the United States* 268-83 (1927), for a detailed discussion of state rate regulation in the early 1900's.

³⁴ Patterson, *supra* note 33, at 268.

³⁵ In 1955, Patterson said it was still "one of the least effective phases of insurance regulation." E. Patterson, *Cases and Materials on Insurance* 43 (3d ed. 1955).

³⁶ See "Hearings on the Insurance Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary," 86th Cong., 1st Sess., pt. 8, at 4840 (1960). [The hearings are in twelve parts and are hereinafter cited as *Hearings*.]

³⁷ Quoted in Kimball & Boyce, "The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective," 56 Mich. L. Rev. 545, 548 (1958).

tions, while regional associations provided the vehicle for companies to fix their rates in concert,³⁸ with the attendant stifling of competition.

The era of the "muckrakers" and "trust busters" around the turn of the century responded by attempting to meet the thriving insurance compacts head-on: twenty-two states enacted laws prohibiting membership in associations which fixed rates.³⁹ These anticomcompact laws were relatively ineffective in deterring cooperative rate making among the insurance carriers, although the Supreme Court of the United States upheld a statute prohibiting combinations of fire insurance companies for the purpose of fixing rates and commissions⁴⁰ and a statute which allowed an insured or beneficiary to recover a twenty-five percent penalty, in addition to actual loss or damage, if the insurer was connected with a rate making association.⁴¹ The Court held that fire insurance companies, acting together, may have property owners practically at their mercy concerning rates and may thus have the power to deprive the public of the advantages flowing from competition. To meet these evils, the states could adopt corrective regulatory patterns.⁴²

The carriers were undeterred. In the face of legislature proscriptions, they felt compelled not to continue the historical pattern of destructive rate wars, which often grievously harmed innocent policyholders with meritorious, but unsatisfied claims. In those states where the anticomcompact laws applied only to domestic companies or failed to include agents, the law was readily circumvented. In jurisdictions with more rigorously drafted statutes, companies promulgated so-called advisory rates. Rate books were sold to companies by an "independent" bureau or informal confidential clubs were formed to remedy industry problems.⁴³

As a result of the chaotic patterns of development of the insurance business in the 1800's and early 1900's, a widely held belief developed—that because of certain unique characteristics of the property and casualty insurance industry, unregulated rate competition was undesirable. Such rates should be regulated by the states under their police powers as an activity affected with the public interest. Some of the characteristics commonly cited were: (1) The insurance contract is a technical and complicated financial document which is hard for many buyers to understand and even harder to evaluate in terms of probable

³⁸ F. Crane, *Automobile Insurance Rate Regulation* 54 (1962).

³⁹ *SEUA*, 322 U.S. 533, 555 n.43 (1944).

⁴⁰ *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401 (1905).

⁴¹ *German Alliance Ins. Co. v. Hale*, 219 U.S. 307 (1911).

⁴² *Id.* at 316.

⁴³ See, e.g., *Aetna Ins. Co. v. Robertson*, 131 Miss. 343, 390, 94 So. 7, 14 (1922); *State ex inf. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595 (1899).

benefits. (2) The policyholder has a contract calling for possible future performance that depends upon the solvency of the insurer; without this there is no insurance at all. (3) Intensive, unregulated competition may result in rates which provide insufficient funds to meet contractual liabilities. (4) Cooperatively established rates may lead to a monopolistic situation, resulting in excessive and unfair premiums. (5) The price of insurance cannot be determined by costs which have been incurred. Insurance costs depend upon future events which in property and casualty insurance may or may not occur. (6) The cost of the service promised is greatly disproportionate to the price paid. (7) The consequences of an insurance company failing are more serious than in other businesses.⁴⁴

B. *Beginning of Rate Regulation*

Early in the twentieth century regulation of insurance rates began.⁴⁵ In 1909, Kansas adopted the first rate regulatory law affecting property and casualty insurance. Every fire insurer had to file its rates and rating plans with the superintendent of insurance, and no changes were effective without ten day's notice to the superintendent. If any rate was deemed excessive or inadequate, the superintendent could order the insurer to file a higher or a lower rate commensurate with the character of the risk. Rate discrimination was prohibited.

When the superintendent ordered a general reduction in fire rates, the German Alliance Insurance Company notified him that it was complying under protest. The company filed suit alleging that the statute was unconstitutional. The circuit court upheld the statute as a proper exercise of a state's police power and observed that although fire insurance is a private business, in the future it would undoubtedly be regarded as affected with the public interest.⁴⁶ The United States Supreme Court affirmed the decision and designated insurance as a "business affected with a public interest."⁴⁷

Following the San Francisco fire in 1909, causing substantial rate increases by all property and casualty insurers, the New York legisla-

⁴⁴ See Cowell, *Federal Regulation of Insurance* 6 (1948); Marryott, "Why Regulate Insurance Rates?," 1946 Proceedings, A.B.A. Sec. of Ins. 305, 309-12. See also Dineen, Gardner & Procter, "The Economics and Principles of Insurance Supervision," in *Insurance and Government* 1, 15-19 (Center & Heins eds. 1962); Stelzer, "The Insurance Industry and the Antitrust Laws: A Decade of Experience," 1955 Ins. L.J. 137.

⁴⁵ W. Wandel, *The Control of Competition in Fire Insurance* 134 (1935).

⁴⁶ *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769, 778 (D. Kan. 1911).

⁴⁷ *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914). See also *O'Gorman & Young v. Hartford Ins. Co.*, 282 U.S. 251 (1931); *National Ins. Co. v. Wanberg*, 260 U.S. 71 (1922).

ture appointed the Merritt Committee to commence a sweeping investigation of fire insurance rate making procedures. The committee reached the conclusion that the anticomcompact approach was a failure because unrestricted competition invited rate wars, resulting in discriminatory rates and a dangerous lowering of the quality of protection afforded by insurers.⁴⁸ Joint action in rate making was deemed essential.⁴⁹ The conclusions of the committee are significant since their rationale is the foundation of present day state regulation. The committee report declared:

It is therefore recommended that no anti-compact bill be passed, but that in place thereof a statute be enacted that will permit combination under State regulation, such regulation to stop short of actually fixing the price at which companies shall sell their insurance, but which shall be of such positive nature that all forms of discrimination in rates will cease; such statute to provide for the filing by such associations and bureaus of all schedules and specific rates with the Insurance Department, and also that all such associations and bureaus shall be subject to the closest supervision by the Superintendent of Insurance, and further that all such associations and bureaus shall keep careful records of their proceedings, and provide for the hearing of interested property-owners who feel aggrieved at the rates charged—all to the end that the potent power of publicity may operate freely to cure any arbitrary action or indefensible methods.⁵⁰

The report led to the enactment of legislation in New York which expressly permitted fire insurers to combine for the purpose of fixing rates and which empowered the insurance superintendent to supervise the activities of fire rating bureaus.⁵¹ Bureaus were to establish the rates charged by member companies. Before their use these rates were to be filed with the state insurance superintendent for approval. The committee was persuaded that fire rating organizations or bureaus were desirable since they could (1) produce more credible statistical data for rate making, (2) reduce the expense of rate making by centralizing the function, (3) provide fewer rate structures for state authorities to investigate, and (4) assist the state in policing the application of rate structures. This recognition of the importance of cooperation in insurance rating marked the beginning of a sharp trend away from

⁴⁸ Rep. of N.Y. Merritt Comm., Assembly Doc. No. 30, 134th Sess. 42 (1911).

⁴⁹ *Id.* at 76.

⁵⁰ *Id.* at 125.

⁵¹ See Stoddard, *The State Supervisor and Regulation of Insurance Rates*, 1922 Proceedings, Nat'l Convention of Ins. Comm'rs 107, for a description of this early New York law.

antitrust and anticomcompact legislation which had prevailed up to that point.⁵²

In 1914, a committee of the National Convention of Insurance Commissioners reported the failure of the anticomcompact laws to bring about open competition⁵³ and recommended state legislation recognizing and regulating rate bureaus and prohibiting discriminatory practices.⁵⁴ Passage of laws making membership or cooperation in public rating bureaus compulsory was also urged.⁵⁵ These recommendations did not attempt to remedy the power of combinations of companies to charge excessive rates. Compulsory membership in a rate bureau may eliminate inadequate rates, but it also suppresses competition and entrenches monopoly control. One must remember, however, that it was not until this same year that the states first found themselves clearly possessed with the power to control rates.⁵⁶ In 1914, the Supreme Court in *German Alliance Ins. v. Lewis*⁵⁷ expanded the concept of "affected with a public interest" to give the states regulatory power over insurance rates.

After 1914 every state sought to regulate rates. Generally the legislative standard imposed was that rates not be inadequate, discriminatory, or excessive. Today this same standard is incorporated into almost every state statute. From 1914 to 1944 state control of fire insurance rates, though diverse, was basically of two kinds. Some statutes reflected the earlier, somewhat naive, simple opposition to rate making combinations, while others reflected the more sophisticated recognition of the need for concerted action under public control. Twelve states had no explicit rate regulatory statutes, but only anti-combination provisions. Four of these anticombination provisions were directed specifically at insurance, prohibiting combinations to control insurance rates, while the other eight were general anti-monopoly provisions in statutes or state constitutions. Fourteen states

⁵² For a discussion of the relative merits of competition and cooperation and conflicting legislation, see Riegel, "Rate-making Organizations in Fire Insurance," 70 *Annals* 172 (1917). The trend toward legislation permitting cooperation is traced in a sequel: Riegel, "The Regulation of Fire Insurance Rates," 130 *Annals* 114 (1927).

⁵³ 1915 Proceedings (Adjourned meetings), Nat'l Convention of Ins. Comm'rs 20.

⁵⁴ *Id.* at 19-21.

⁵⁵ *Id.*

⁵⁶ See *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 416 (1914). See also *German Alliance Ins. Co. v. Hale*, 219 U.S. 307, 316 (1911); *Citizens' Ins. Co. v. Clay*, 197 Fed. 435, 436 (E.D. Ky. 1912); *Bell v. Louisville Bd. of Fire Underwriters*, 146 Ky. 841, 143 S.W. 388 (1912); Rep. of N.Y. Merritt Comm., Assembly Doc. No. 30, 134th Sess. 50-51 (1911), commenting upon regulatory steps taken by Kansas, Texas, and Louisiana.

⁵⁷ 233 U.S. 389 (1914).

had anticomcompact provisions directed specifically to insurance, and forbidding combinations except as authorized by cognate rate regulatory statutes. Fifteen states had general antimonopoly statutes or constitutional provisions in addition to rate regulatory statutes. Four states had only rate regulatory provisions. Thus by 1944 thirty-three states had rate regulatory machinery, usually coupled with antimonopoly provisions.⁵⁸ The effectiveness of control varied from purely paper machinery in some states to relatively complete, effective control in others. In New York, prior to their use, rates were filed by insurers or rating organizations and were approved or disapproved by the state. In Texas, the state actually made and promulgated rates. Even in states with fairly effective control of fire insurance rates, the control was relatively ineffective or altogether lacking in other lines.⁵⁹

C. Casualty Insurance

Prior to the mid-1940's no discernible regulatory pattern existed in any casualty line except workmen's compensation insurance. Most regulation centered on discriminatory practices.⁶⁰ Automobile insurance rates had to be filed for approval by a state regulatory entity in only a handful of jurisdictions.⁶¹ In general, rate competition flourished in the casualty industry.⁶²

IV. UNITED STATES V. SOUTH-EASTERN UNDERWRITERS ASS'N

Until 1944 state regulation rested on the assumption that insurance was not commerce and therefore was not subject to federal control. The states believed that they had the sole power to regulate insurance. In the *SEUA*⁶³ case the Supreme Court held that if the activities of an insurer are conducted across state lines, it is engaged in interstate commerce and is subject to federal regulation.

⁵⁸ This classification and count is from Note, 33 Geo. L.J. 70, 73-80 (1944). A somewhat different classification and count is to be found in Brief of Appellant, at 130-31, *SEUA*, 322 U.S. 533 (1944). See also "Joint Hearing Before the Subcomm. of the Comm. on the Judiciary on S. 1362, H.R. 3269 and H.R. 3270," 78th Cong., 1st Sess. 55-57 (1943) [hereinafter cited as Joint Hearings].

⁵⁹ Moser, "Operation of Independents Under the Rate Regulatory Pattern," 15 Law & Contemp. Prob. 523, 526 (1950).

⁶⁰ C. Kulp, *Casualty Insurance* 623 (rev. ed. 1942).

⁶¹ *Id.* at 626, 627.

⁶² Moser, *supra* note 59, at 527.

⁶³ 322 U.S. 533 (1944). The decision has been extensively commented on. See Powell, "Insurance as Commerce," 57 Harv. L. Rev. 937 (1944); 29 Marq. L. Rev. 55 (1944); 20 Ind. L. Rev. 184 (1947); Note, 44 Colum. L. Rev. 772 (1944); Highsaw, "Insurance as Interstate Commerce: An Analysis of the Underwriters Case," 6 La. L. Rev. 24 (1944); 19 St. John's L. Rev. 56 (1944); Harrington, "An Exploration of the Effects of the S.E.U.A. Decision," 1944 Ins. L.J. 590.

The catalyst which precipitated the case had its origins in 1922 when the Missouri superintendent of insurance ordered a reduction in fire insurance rates. Pending the final disposition of the litigation, ten million dollars, representing the disputed portion of the premiums, was impounded.⁶⁴ Disposition of this sum triggered almost two hundred lawsuits.⁶⁵ After approximately twenty years of legal maneuvering among the litigants, the Missouri superintendent of insurance was bribed to recommend a settlement favorable to the insurance companies. Tax investigations revealed the fraud.⁶⁶ The proceedings convinced Missouri's attorney general that the interstate character of the insurance industry left him powerless to deal effectively with the manifest abuses. Consequently, he consulted the United States Attorney General for advice. The latter became convinced that insurance was commerce and that the federal antitrust laws were applicable. The Department of Justice decided to test this hypothesis in the *SEUA* case.⁶⁷

An indictment was filed in a district court in Georgia against the South-Eastern Underwriters Association (an unincorporated association of stock fire companies doing business in Alabama, Florida, Virginia, North Carolina, South Carolina, and Georgia), twenty-seven of its officers, and one hundred ninety-eight of the member companies. The indictment charged an agreement (1) to fix rates for fire and certain allied lines of insurance, (2) to fix commissions, (3) to adopt reclassifications of risks on which basis rates are fixed, (4) to adhere to standard terms, conditions, and clauses in insurance contracts, (5) to withhold reinsurance facilities from nonmembers of the South-Eastern Underwriters Association, (6) to withdraw from and refuse to enter into agencies representing nonmembers, (7) to boycott and withhold patronage from purchasers of insurance from nonmembers, (8) to disparage the services and facilities of nonmembers, (9) to maintain rating bureaus to police these agreements, and (10) to maintain boards and groups of agents for the same purpose.⁶⁸ Six charges—(1), (2), (3), (4), (9), and (10)—involved rate-fixing; three charges—(5), (6), and (7)—involved boycotts; the remaining charge—(8)—

⁶⁴ 322 U.S. 533, 562-63, 583 (1944).

⁶⁵ See cases cited in Joint Hearings 110 (1943).

⁶⁶ *American Ins. Co. v. Lucas*, 38 F. Supp. 896 (W.D. Mo. 1940), 38 F. Supp. 926 (W.D. Mo. 1941); *United States v. Pendergast*, 39 F. Supp. 189 (W.D. Mo. 1941). See also *Missouri v. American Ins. Co.*, 355 Mo. 1053, 200 S.W.2d 1 (1946), for numerous citations to related cases.

⁶⁷ Joint Hearings 25-26 (1943). See also Elmore, "How Insurance Became Commerce," *J. Am. Ins.*, July 1945, at 4, for the events preceding the *SEUA* decision.

⁶⁸ See Transcript of Record at 1-15, *United States v. South-Eastern Underwriters Ass'n*, 51 F. Supp. 712 (N.D. Ga. 1943).

related to slander. The validity of the last charge is questionable since the defendants were not accused of making any specific false statements, and for one to allege that his competitor's product or service is less desirable hardly amounts to an actionable wrong.

The gravamen of the indictment was the rate fixing charge. If a group of owners or manufacturers of a product agree upon a stated price, the agreement violates the federal antitrust laws, regardless of whether the prices are or are not reasonable.⁶⁹

In August 1943, the district court judge sustained a demurrer to the indictment,⁷⁰ relying on the doctrine of *Paul v. Virginia* and its progeny.⁷¹ The essence of his reasoning was

To constitute a violation of the Sherman Act, the restraint and monopoly denounced must be that of interstate trade or commerce⁷²

. . . .
The Supreme Court has repeatedly held . . . that the business of insurance is not commerce, either intrastate or interstate⁷³

. . . .
If there is to be any overruling of the long line of clear and thoroughly considered decisions of the Supreme Court, acquiesced in for seventy-five years by Congress and administrative agencies, it will have to be done by the Supreme Court itself, or by Congress.⁷⁴

⁶⁹ See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

⁷⁰ *United States v. South-Eastern Underwriters Ass'n*, 51 F. Supp. 712 (N.D. Ga. 1943).

⁷¹ In support of his statement that the business of insurance is not commerce, the judge cited the following cases as examples of those in which the Supreme Court so declared "unequivocally and unambiguously," *id.* at 713: *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Bothwell v. Buckbee, Mears Co.*, 275 U.S. 274 (1927); *New York Life Ins. v. Deer Lodge County*, 231 U.S. 495 (1913); *New York Life Ins. v. Cravens*, 178 U.S. 389 (1900); *Noble v. Mitchell*, 164 U.S. 367 (1896); *Hooper v. California*, 155 U.S. 648 (1895); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

⁷² *United States v. South-Eastern Underwriter Ass'n*, 51 F. Supp. 712, 713 (N.D. Ga. 1943).

⁷³ *Id.*

⁷⁴ *Id.* at 715. Unlike the district court for the Northern District of Georgia which faithfully adhered to *Paul v. Virginia* and the succeeding cases, the court of appeals in *Polish Nat'l Alliance v. NLRB*, 136 F.2d 175, 179 (7th Cir. 1943), *aff'd*, 322 U.S. 643 (1944), said:

The support which these cases afford petitioner's contention is not so real as first impression might indicate. Certainly they are not decisive. It must be noted that in each of them the Court was considering the power of the State to tax or regulate, and not the power of Congress under the Commerce Clause. It has frequently been held that the line which marks the beginning of the state's power to tax or regulate is not the terminal boundary of federal power.

This language is a concise summary of the majority opinion in the *SEUA* decision.

The government appealed the decision directly to the Supreme Court⁷⁵ and secured a four-to-three reversal of the district court's decision.⁷⁶ In writing for the majority, Mr. Justice Black first artfully dodged the seventy-five years of precedent that insurance policies and the insurance business were not commerce. He did this by pointing out that these prior cases involved the validity of state regulation or taxation and not an act of Congress. Mr. Justice Black observed that for the first time in the history of the Court the *SEUA* case presented the issue of whether the commerce clause grants to Congress the power to regulate interstate insurance transactions. He reasoned that fire insurance transactions stretching across state lines constitute "commerce among the several States" so as to make them subject to regulation by Congress under the commerce clause. The reason for this is because there

is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts.⁷⁷

Next, he reasoned that the Sherman Act was intended to prohibit conduct of fire insurance companies which restrained or monopolized interstate fire insurance activities, even though considerable precedent had been developed by the Court prior to the enactment of the Sherman Act that insurance was not commerce. Black reached this conclusion by reasoning that "not one piece of reliable evidence" exists "that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power."⁷⁸

In a lengthy dissent Mr. Chief Justice Stone took a much narrower view of the issue of whether insurance was in interstate commerce. Although he admitted that "the business of insurance as presently conducted has in many aspects such interstate manifestations and such effects on interstate commerce as may subject it to the appropriate

⁷⁵ The authority for direct appeals is the Criminal Appeals Act, 18 U.S.C. § 682 (1965), permitting direct appeals to the Supreme Court where judgments below setting aside or sustaining a demurrer to an indictment are based solely on the invalidity or construction of a statute. *See also* *United States v. Swift & Co.*, 318 U.S. 442, 444 (1943).

⁷⁶ The majority consisted of Justices Black, Murphy, Douglas and Rutledge; the minority of Chief Justice Stone and Justices Frankfurter and Jackson. Justices Roberts and Reed did not sit. The latter disqualified himself because his son represented the *SEUA*.

⁷⁷ *SEUA*, 322 U.S. 533, 541 (1944).

⁷⁸ *Id.* at 557.

exercise of federal power,"⁷⁹ he reasoned that the focus of the indictment was only on the formation of insurance contracts, which Stone argued were purely intrastate in character and that the incidental use of facilities of interstate commerce does not change the policies' intrastate character. And, contrary to Black, Stone concluded that from the legislative history of the Sherman Act it was clear that the act was not intended to govern insurance transactions. Subsequently, the McCarran Act affirmatively applied the Sherman Act to the insurance business. Basically, Stone rested his analysis on a narrowly defined concept of insurance, adhering to the precedent of the Court, in order to preserve the existing regulatory and tax framework of the states developed in reliance upon the precedent.

Dissenting in part, Mr. Justice Jackson admitted that if the Court were considering the question for the first time, he

would have no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce and therefore that congressional power to regulate prevails over that of the states.⁸⁰

But he was of the opinion that the Court should not reverse the trend of state taxation and regulation that had developed following *Paul v. Virginia* and its progeny. Since insurance had "acquired an established doctrinal status not based on present-day facts,"⁸¹ which has been long acted upon by the Court, the states, and Congress, Jackson reasoned that "common sense and wisdom," rather than the "abstract logic" of the majority⁸² should be followed since both the state and federal governments had accommodated the structure of their laws to the error. He concluded that the way to effect federal supervision of insurance was through legislation, not judicial fiat.⁸³

A. Reaction to the SEUA Decision

The SEUA decision was immediately attacked for allegedly reversing a practice instituted by Mr. Chief Justice Marshall in 1834. For example, Professor Charles Warren wrote in the New York Times:

[I]t should be noted that the decision on a constitutional question of vast importance was rendered by a minority of the full court. This decision, therefore, reverses a wise practice of the court instituted by Chief Justice Marshall's court 110 years ago, in 1834, whereby the court then voluntarily asserted that it would not decide

⁷⁹ *Id.* at 563.

⁸⁰ *Id.* at 586.

⁸¹ *Id.* at 588.

⁸² *Id.* at 589.

⁸³ *Id.* at 593.

any case involving a constitutional question unless a majority of the whole court should concur.⁸⁴

However, one of the dissenters, Mr. Justice Jackson, admitted that insurance is commerce, but dissented to preserve the doctrine of stare decisis. Also the split of the Court did not revolve around a constitutional interpretation as such, for none of the dissenters denied the power of Congress to take needed regulatory action.⁸⁵

Many individuals were shocked by the decision and predicted grave consequences, seizing on the statement of Mr. Justice Jackson that

The Court's decision at the very least will require an extensive overhauling of state legislation relating to taxation and supervision. The whole legal basis will have to be reconsidered . . . Certainly the states lose very important controls and very considerable revenues.⁸⁶

These critics released an emotional outburst concerning the decision. "Dislocations are so numerous and the task of repair is so extensive that attention is focused upon obvious and immediate necessities" of taxation and rating.⁸⁷ "[T]he decision . . . [has] a devastating impact upon the entire system of state regulation built up, through trial and error, over a period of more than seventy-five years."⁸⁸ As a result of the decision, the right of states "to continue to regulate the business . . . [is] in jeopardy,"⁸⁹ creating a "vast void of uncertainties."⁹⁰ Congress regarded the decision as "precedent-smashing."⁹¹ Newspapers raised a hue and cry about the decision.⁹² The industry predicted that the natural result of increased competition arising from the decision would render many companies insolvent.⁹³ The industry argued that existing regulatory statutes were designed to preserve solvency, and that the application of the federal antitrust laws to exclude state regulation would have a disastrous result.⁹⁴ Following the decision some companies

⁸⁴ N.Y. Times, June 8, 1944, at 16, col. 4.

⁸⁵ See Note, 44 Colum. L. Rev. 772 (1944).

⁸⁶ *SEUA*, 322 U.S. 533, 590 (1944).

⁸⁷ E. Sawyer, *Insurance as Interstate Commerce v* (1945).

⁸⁸ *Id.* at 50.

⁸⁹ Beach, "The South-Eastern Underwriters' Decision and Its Effect," 1947 Wis. L. Rev. 321, 322.

⁹⁰ McCarran, "Insurance as Commerce—After Four Years," 23 Notre Dame Law. 299, 302 (1948).

⁹¹ 90 Cong. Rec. 6524-25 (1944). See also H.R. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945).

⁹² See Note, 44 Colum. L. Rev. 772, 773 n.10 (1944).

⁹³ H.R. Rep. No. 873, 78th Cong., 1st Sess. 8 (1944).

⁹⁴ See 91 Cong. Rec. 1092 (1945).

refused to abide by state regulatory provisions or to pay state taxes, on the theory that such regulation and taxation were unconstitutional restraints on interstate commerce.⁹⁵

Undoubtedly these protests are subject to the barb of the first Mr. Justice Harlan, voiced forty years before the *SEUA* decision:

It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted . . . to restrain their operations and to protect the public against their exaction

The suggestions of disaster to business have . . . their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case⁹⁶

Professor Patterson stated the point more picturesquely:

I suspect that many of those who now oppose federal regulation of insurance do so chiefly because they fear that it will be more efficient and thorough than state regulation. Like the frogs in Aesop's fable, they would have a log as king rather than a stork.⁹⁷

Although the decision shocked many persons and aroused considerable apprehension concerning its possible implications, the decision had been foreseen by several observers.⁹⁸ Professor Willis, long an advocate of the idea that insurance is interstate commerce, and a severe critic of *Paul v. Virginia*, rejoiced in the decision, stating that the Court had "done a fine piece of work."⁹⁹ Professor Patterson was optimistic about the implications of the decision, for he observed that it was unlikely that the basic plan of state supervision of insurance would be overturned by the Supreme Court as a result of its decision in the *SEUA* case.¹⁰⁰ But he went on to say that the chief threat to continued state supervision was not from the Supreme Court, but from Congress.¹⁰¹ Patterson's remarks seem sound. They clearly reflect the observations of Mr. Justice Black in the majority's opinion. Black an-

⁹⁵ S. Rep. No. 20, 79th Cong., 1st Sess. 2 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945); 91 Cong. Rec. 478-79 (1945).

⁹⁶ Northern Sec. Co. v. United States, 193 U.S. 197, 351-52 (1904).

⁹⁷ Patterson, "The Future of State Supervision of Insurance," 23 Texas L. Rev. 18, 30 (1944).

⁹⁸ See Berke, "Is the Business of Insurance Commerce?," 42 Mich. L. Rev. 409 (1943); Dodd, "The Decreasing Importance of State Lines," 27 A.B.A.J. 78, 84 (1941); Timberg, "Insurance and Interstate Commerce," 50 Yale L.J. 959 (1941); Nehemkis, "Paul v. Virginia: The Need for Re-examination," 27 Geo. L.J. 519 (1939).

⁹⁹ Willis, "United States of America v. South-Eastern Underwriters Association," 1944 Ins. L.J. 390.

¹⁰⁰ Patterson, *supra* note 97, at 29.

¹⁰¹ *Id.*

swered Jackson's contention that the states had lost "very important controls and very considerable revenues,"¹⁰² by pointing out:

[T]here is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid.¹⁰³

This observation of Mr. Justice Black was the basis of the Court's decision in *Robertson v. California*,¹⁰⁴ decided two years after the *SEUA* case. In the *Robertson* case, the Court held that the insurance business is within the states' concurrent power over commerce. As long as Congress has not preempted the field, the states are free to regulate in the exercise of their police powers. Consequently, the Court upheld a California statute which limited the activities of unadmitted insurers or unlicensed agents.¹⁰⁵

B. *Implications of Parker v. Brown*

In addition to the rather reassuring comments of Mr. Justice Black in the *SEUA* decision regarding the validity of state regulation and taxation, another consideration supported the efficacy of state control. This consideration, as Black suggests, seems to have been virtually ignored by the numerous critics of the decision.

The opinion in *Parker v. Brown*,¹⁰⁶ decided a year before the *SEUA* case, furnished support to the idea of the states' establishing insurance rates, without such rates being subject to the federal antitrust laws.¹⁰⁷ The Court held that state action or sanctions running counter

¹⁰² *SEUA*, 322 U.S. 533, 590 (1944).

¹⁰³ *Id.* at 548.

¹⁰⁴ 328 U.S. 440 (1946).

¹⁰⁵ The Court decided the case independently of the McCarran Act, 15 U.S.C. §§ 1011-15 (1965), ch. 209, 59 Stat. 33 (1945), as amended, discussed in section V *infra*.

¹⁰⁶ 317 U.S. 341 (1943).

¹⁰⁷ See Note, 96 U. Pa. L. Rev. 223, 228-29 (1947); Guiher, "United States v. South-Eastern Underwriters Ass'n: Its Impact on Existing Federal Statutes," 1944-48 Proceedings, A.B.A. Sec. of Ins. 33-37; E. Sawyer, Insurance as Interstate Commerce 149-50 (1945), for an indication that the insurance companies had much hope for the *Parker* doctrine

to the policies of the Sherman Act are valid because the Sherman Act was intended to apply to private activity restraining trade and not to prohibit an act of government. The main issue in the case was whether agricultural programs sanctioned and administered by the State of California violated the Sherman Act. The state programs were intended to benefit raisin producers by regulating the supply reaching the market. The action of the state officials consisted of (1) granting permission to institute the programs, (2) approving or modifying suggested programs, and (3) enforcing the programs through sanctions provided by the legislature.

The type of state law which clearly conflicts with the Sherman Act would be one which authorized a private combination of insurance companies to fix rates without approval of any state authority. The states cannot nullify federal antitrust laws by authorizing private persons or groups subject to the antitrust laws to do what such laws forbid. As the Court stated in *Parker*, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."¹⁰⁸ In 1944, this limitation would seem to have nullified the activities of rate bureaus in probably only five states, where the laws expressly or impliedly authorized or required rate bureaus to establish rates which were not subject to the approval or disapproval of any governmental agency. In eleven other states in which bureau rates were operative unless disapproved by the state, the Sherman Act might have applied to such rates, depending on how they were established. If approved by the state commissioner, or established independently by him (as was possible in nine of the eleven states), they probably would have been regarded as an act of the state. In the remaining thirty-two states, six expressly had forbidden companies to combine for the making of rates; thirteen did not authorize such conduct in any way. In six states, rating bureaus were authorized only to make actuarial recommendations, but not joint agreements on rates. In five states, rates were determined by rate bureaus, but did not become effective until state approval had been obtained. In Texas the rates were fixed by the state; in Nevada the rates of every fire insurer had to be filed with and approved by the state commissioner before they became effective.¹⁰⁹

Following the Supreme Court's decision in *Schwegmann Bros. v.*

prior to federal legislation in the form of the McCarran Act, 15 U.S.C. §§ 1011-15 (1965), ch. 209, 59 Stat. 33 (1945), as amended.

¹⁰⁸ 317 U.S. 341, 351 (1943).

¹⁰⁹ For a tabulation of the laws of the states in relation to the doctrine of *Parker v. Brown*, see Brief for Appellant, at 27-31, *SEUA*, 322 U.S. 533 (1944).

*Calvert Distillers Corp.*¹¹⁰ in 1951, the *Parker* doctrine may have been put on a somewhat narrower pedestal than one might have thought it had previously occupied. The *Schwegmann Bros.* case involved the attempt of two distillers, Calvert and Seagram, to enjoin Schwegmann Brothers, New Orleans supermarket operators, from cutting the prices of their branded liquor products in sales at retail. Schwegmann Brothers had refused to enter into a resale price-fixing agreement with the distillers, and the latter sought to stop the price-cutting by invoking the "nonsigner" clause of the Louisiana Fair Trade Act. The Court held that the action could not be maintained on the ground that the efforts of the distillers to impose price control upon an unwilling dealer amounted to a violation of the Sherman Antitrust Act, unprotected by the Miller-Tydings amendment to that act. The *Parker* and *Schwegmann Bros.* decisions suggest that where both the initiation and enforcement of prices by private parties is completely discretionary under a state statute, no protection from the federal antitrust laws arises. If one reads these decisions together, the conclusion reached seems to be that for state action to shield private parties from the federal antitrust laws, the state must not merely authorize the activities proscribed by federal law, it must compel such activities and impose sanctions against those who do not comply or otherwise exercise positive controls.¹¹¹

C. Impact of the SEUA Decision on State Taxation of Insurance

The *SEUA* decision left open the question of taxation of interstate insurance activities.¹¹² Yet one may argue that the Court did not intend to impair state premium taxes because four years prior to the decision in *SEUA* the Court upheld a sales tax levied by New York City on coal transported in interstate commerce and delivered in the city.¹¹³ The similarity between a sales tax and premium tax (essentially a sales tax collected at the source), and the reasoning of the Court in the *McGoldrick* case, is strongly persuasive evidence that the Court would have upheld state premium taxes.

Other decisions of the Court also support this conclusion. For example, in one case the Court commented on the decisions upholding

¹¹⁰ 341 U.S. 384 (1951).

¹¹¹ See Rahl, "Resale Price Maintenance, State Action, and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp.," 46 Ill. L. Rev. 349, 360-72 (1951), for a discussion of the type of state action necessary to cloak private action with impregnability from the Sherman Act.

¹¹² For a discussion of the impact of the *SEUA* case on state tax laws, see, e.g., Orfield, "Improving State Regulation of Insurance," 32 Minn. L. Rev. 219, 254-58 (1948); Tye, "The Aftermath of the S.E.U.A. Case," 23 Taxes 610 (1945).

¹¹³ *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

state taxation by saying that it had sustained nondiscriminatory taxes on sales to buyers within taxing states of commodities shipped interstate in performance of sales contracts, not upon the ground that delivery was not a part of interstate commerce, but because the taxes were not a prohibited regulation of, or burden on, interstate commerce.¹¹⁴ The Court noted that it had previously upheld the states' power to regulate interstate prices and rates of a local character so long as interstate commerce was not unduly burdened, which is determined by weighing and accommodating the competing demands of state and national interests.¹¹⁵

With respect to the constitutional limitations upon the power of a state to tax insurance contracts consummated outside its borders between its citizens and unlicensed foreign insurers, various cases¹¹⁶ have held that a state has no power to regulate or tax these insurance or reinsurance contracts, even though the property or risks covered are located within the state. The rule is otherwise where the foreign insurer was or has been licensed in the state and had sent agents or engineers to inspect risks or otherwise represent the company's interests.¹¹⁷

More recently the Supreme Court invalidated as, a violation of the due process clause of the fourteenth amendment, a five percent tax on gross premiums paid by any person to any unlicensed insurer for insurance on Texas risks placed other than through an agent licensed in Texas. A New York corporation doing business in Texas insured its property in Texas with an insurance company not licensed in Texas and which had no agents, office, or place of business in Texas and neither solicited business nor investigated risks or claims in that state. The contracts were negotiated, the policies issued, and the premiums paid outside Texas. All losses under the contracts were adjusted and paid outside the state.¹¹⁸

¹¹⁴ *Illinois Natural Gas Co. v. Central Ill. Pub. Serv. Co.*, 314 U.S. 498, 505 (1942).

¹¹⁵ *See Milk Control Bd. v. Eisenberg Farm Prods. Co.*, 306 U.S. 346 (1939); *Pennsylvania Gas Co. v. Public Serv. Comm'n*, 252 U.S. 23 (1920); *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders*, 234 U.S. 317 (1914).

The *SEUA* decision did not involve an attack on state legislation. If it had and the Court struck down state regulation of interstate insurance transactions, then the purported jeopardy of state taxation of insurance would have been justified.

¹¹⁶ *See Connecticut Gen. Ins. Co. v. Johnson*, 303 U.S. 77 (1938); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

¹¹⁷ *See Osborn v. Ozlin*, 310 U.S. 53 (1940). *See also Hoopeson Co. v. Cullen*, 318 U.S. 313 (1943).

¹¹⁸ *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). *Cf. Ministers Life & Cas. Union v. Haase*, 30 Wis. 2d 339, 141 N.W.2d 287, *appeal dismissed*, 385 U.S. 205 (1966), discussed in section VII *infra*.

V. McCARRAN ACT

Following the *SEUA* decision four basic alternatives were feasible: (1) A system of federal control could have been created, perhaps comparable to federal regulation of railroads. (2) The insurance industry could have operated on a freely competitive basis, without a protective system of state laws, and subject to existing federal laws. (3) Congress could have granted the insurance business a blanket exemption from federal regulation. (4) Congress could have preserved state regulation as it existed prior to 1944 by establishing a limited exemption from federal control. Alternatives 1 and 2 were never seriously considered. Congress rejected alternative 3 in favor of alternative 4.

Pending the Supreme Court's decision in *SEUA*, there were unsuccessful attempts to exempt the insurance business from the Sherman and Clayton Acts, although the proposals failed to include an exemption from the Federal Trade Commission Act.¹¹⁹ The arguments in favor of such legislation were simply that the states had always regulated the business of insurance and that this regulation had been complete and effective.¹²⁰ One reason for the failure of this legislation to pass was a survey conducted by the Department of Justice which purportedly revealed that about one-half the states in which rating bureaus operated had inadequate provisions for regulating insurance companies, leaving the public at the mercy of price-fixing combinations, which are illegal per se under the Sherman Act.¹²¹ Another reason the legislation failed to be enacted was Attorney General Biddle's statement that the Department would take no action until the insurance companies had time to adjust their practices to accommodate themselves to the *SEUA* decision, and until Congress had an opportunity to act.¹²² Furthermore, the proposed bills did not receive the support of the National Association of Insurance Commissioners (NAIC) nor of other major segments of the industry. The bills were sponsored by stock companies which adhered to rate bureau practices.¹²³ The NAIC countered this plan, which would have provided a complete exemption, with its own proposal.¹²⁴

¹¹⁹ S. 1362, H.R. 3269, and H.R. 3270, 78th Cong., 1st Sess. (1943). These proposed bills are criticized in Threadgill, "Insurance Under the Sherman Act," 32 Geo. L.J. 66 (1943).

¹²⁰ See Joint Hearings.

¹²¹ See Joint Hearings 55-57, 142 (1943).

¹²² Joint Hearings 635-36 (1944).

¹²³ See Mertz, "The First Twenty Years—A Case-Law Commentary on Insurance Regulation under the Commerce Clause," 1963-64 Proceedings, A.B.A. Sec. on Ins., Neg. & Comp. L. 153, 157 [hereinafter cited as Mertz].

¹²⁴ For the full text of the NAIC bill and the statement which accompanied it, see 90 Cong. Rec. A. 4403-08 (1944).

The McCarran-Ferguson Act introduced in January 1945¹²⁵ made many structural changes in the NAIC proposal and was itself amended several times¹²⁶ before enactment on March 9, 1945.¹²⁷ But it retained the basic concept of the NAIC proposal—that voluntary action in concert is sanctioned when regulated by the states. In authorizing the continued control of the insurance business by the states, rather than devising a federal regulatory scheme, Congress was motivated by two considerations: It feared the chaos that purportedly might accompany disruption of well-established patterns of state regulation and taxation;¹²⁸ and it was persuaded that the states were better equipped than the federal government to regulate insurance because of their proximity to the "local" insurance industry's problems and because of their experience and presumed expertise in regulating the industry.¹²⁹

The core of the McCarran Act is sections 2 and 3, which provide:

Section 2(a). The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b). No Act of Congress shall be construed to invalidate, impair, or supersede any law, enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948, [later extended to June 30, 1948] . . . the Sherman Act, . . . the Clayton Act . . . , and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3(a). Until January 1, 1948, [later extended to June 30, 1948] . . . the Sherman Act, . . . the Clayton Act, and the . . . Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b). Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The phrase in section 2(b), "to the extent that such business is not regulated by State law," is the major source of problems in state rate regulation and will be discussed in detail in section VII *infra*.

The purpose of section 3(a) was to grant the opportunity to the states to enact appropriate legislation to regulate insurance under

¹²⁵ 91 Cong. Rec. 330 (1945).

¹²⁶ For the legislative history of the act, see Note, "A Year of S.E.U.A.," 23 Chi-Kent L. Rev. 317 (1945).

¹²⁷ 15 U.S.C. §§ 1011-15 (1965), ch. 209, 59 Stat. 33 (1945), as amended, [hereinafter referred to as the McCarran Act].

¹²⁸ S. Rep. 20, 79th Cong., 1st Sess. (1945).

¹²⁹ See, e.g., 91 Cong. Rec. 1087 (1945); 90 Cong. Rec. 6532 (1944).

section 2(b) and to the insurance companies to revise their practices to conform with such legislation and with section 3(b).¹³⁰

One of the most puzzling, and unresolved, questions about the Act is raised by section 3(a). The problem is to what extent, if at all, after June 30, 1948, does the Robinson-Patman Act apply to the insurance business, whether or not the types of practices proscribed by that act are regulated by the states. The uncertainty stems from two sources. First, does the Robinson-Patman Act apply to insurance since its various sections refer only to the sale of "commodities," "goods," "wares," and "merchandise." Second, what inference should one draw from the fact that while section 3(a) of the McCarran Act mentions the Robinson-Patman Act among the statutes suspended until July 1, 1948, section 2(b) does not mention it as one of the statutes made applicable to insurance at the end of the moratorium, unless ousted by state regulation. Much has been said and written on both sides of this issue.¹³¹ Approximately half the states have concluded that state regulation in this area is prudent and have enacted laws authorizing the common practice of insurance companies paying commissions to an insurance broker, acting on behalf of an insured¹³²—a practice which might violate the Robinson-Patman Act.

The network of highly restrictive rules developed prior to 1944 which were designed to insulate insurance agencies and, in turn, companies from competition came directly in the line of fire of section 3(b) of the McCarran Act. This section provides that the Sherman Act is applicable to agreements to, or acts of, boycott, coercion, or intimidation, regardless of whether the states undertake to "regulate" these activities.¹³³

¹³⁰ See 91 Cong. Rec. 1442-44 (1945).

¹³¹ Compare Stone & Campbell, "Insurance and the Robinson-Patman Act," 1949 Ins. L.J. 553, with Glassie, "Insurance and the Robinson-Patman Act: Revisited," 1957 Ins. L.J. 85. See also Navjoks, "Regulation of the Insurance Business and Public Law 15 79th Congress, First Session," 30 Marq. L. Rev. 77 (1946); Beach, "The South-Eastern Underwriters' Decision and Its Effects," 1947 Wis. L. Rev. 321, 324.

¹³² See Mertz at 228-29 for citations to these statutes.

¹³³ References to such rules may be found in the SEUA opinion, 322 U.S. 533 (1944); II S. Whitney, Antitrust Policies 374 (1958); State of New York, Report of the Joint Legislative Committee on Insurance Rates and Regulation 19-20 (1948); Butler, "Activities of Agents under the McCarran Act," 15 Law & Contemp. Prob. 568 (1950). These practices included (1) the single counter rule—that a company could have only one agent in an area; (2) the limitation of agency rule—that a company could have only an agreed number of agents in an area; (3) the territorial limitation rule—that certain agents could write business only in certain parts of a designated territory; and (4) the reinsurance rule—that members of a rate bureau could not grant reinsurance to non-member companies. Most of the practices have been discontinued. Before the SEUA decision, the Insurance Executives Association voted to abandon such of these rules that it had previously partici-

VI. ALL-INDUSTRY BILLS

Although the McCarran Act did not impose any obligation on the states to enact new rate regulatory laws, Senator McCarran remarked that "Congress held out an invitation to the states to deal affirmatively and effectively with those activities and practices of the insurance business which might otherwise be subject to federal regulation."¹³⁴ Congress was persuaded that collaborative rate-making was clearly desirable. For example, Senator Ferguson observed:

This bill would permit—and I think it is fair to say that it is intended to permit—rating bureaus I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance.¹³⁵

A. NAIC-AIC Joint Committee

Within approximately three years after the McCarran Act, almost every state, as a result of two strong groups, passed detailed laws which regulated the rate making procedure for practically all lines of property and casualty insurance.

One group was the National Association of Insurance Commissioners (NAIC). The various state commissioners undoubtedly did not want to lose their exclusive jurisdiction over the industry nor did they wish to have their prerogatives weakened or reduced. The McCarran Act provided them a unique opportunity to strengthen and expand their powers under the guise of states' rights.¹³⁶ The potential intrusion and subsequent domination by the federal government in insurance regulation probably was the overriding concern of the state commissioners. These anxieties concerning the intrusion of the federal government into their domain were somewhat neurotic since the Supreme Court's decisions in *Robertson v. California*¹³⁷ and *Prudential Ins. Co. v. Benjamin*¹³⁸ reaffirmed the validity of existing state control. Never-

pated in and wrote to 700 local associations that they would no longer be bound by them. II S. Whitney, *Antitrust Policies* 374 (1958). In 1950 the National Association of Insurance Agents notified its state associations that it would no longer aid in the enforcement of these rules. In many states Department of Justice proceedings precipitated their abandonment, e.g., *United States v. Insurance Bd. of Cleveland*, 188 F. Supp. 949 (N.D. Ohio 1960), 144 F. Supp. 684 (N.D. Ohio 1956); *United States v. New Orleans Ins. Exch.*, 148 F. Supp. 915 (E.D. La.), *aff'd, per curiam*, 355 U.S. 22 (1957).

¹³⁴ McCarran, "Federal Control of Insurance: Moratorium under Public Law 15 Expired July 1," 34 A.B.A.J. 539, 540 (1948).

¹³⁵ 91 Cong. Rec. 1481 (1945).

¹³⁶ See Brook, "Public Interest and the Commissioners'-All Industry Laws," 15 Law & Contemp. Prob. 606, 608 (1950).

¹³⁷ 328 U.S. 440 (1946).

¹³⁸ 328 U.S. 408 (1946).

theless, the commissioners sought more comprehensive legislation effecting their control over rate making practices. In addition to these fears of the commissioners, it has been charged that the leading force in the NAIC for new, more stringent, rate legislation was the New York superintendent of insurance, who allegedly reflected the desire of the major rate bureau companies based in New York to be shielded by protective legislation.¹³⁹

The other group responsible for the passage of these laws was the All-Industry Committee (AIC). The committee was organized in May 1945 at a joint meeting of the Federal Legislation Committee of the NAIC and representatives of the insurance industry "to aid in the formation of a legislative program to strengthen existing state laws within the meaning of section 2(b) of the McCarran Act."¹⁴⁰ This committee consisted of nineteen members.¹⁴¹ Of the nineteen, six had no interest in the rating requirements of the fire and casualty model bills which were ultimately drafted because either the bills expressly exempted their lines of insurance¹⁴² or they did not write fire or casualty business.¹⁴³ Of the four organizations representing agents or brokers, at least two were actively opposed to the rigor of the bills.¹⁴⁴ A third organization¹⁴⁵ was divided in its position. It formally declared that the members of each state organization were free to exercise their own

¹³⁹ Patterson, "At the Crossroads," *Best's Fire & Cas. News*, April 1947, at 32, 52.

¹⁴⁰ Quoted in Brook, "Public Interest and the Commissioners'-All Industry Laws," 15 *Law & Contemp. Prob.* 606, 608 n.14 (1950).

¹⁴¹ American Institute of Marine Underwriters, American Life Convention, American Mutual Alliance, American Reciprocal Association, Associated Factory Mutual Fire Insurance Companies, Association of Casualty and Surety Executives, Bureau of Personal Accident and Health Underwriters, Health and Accident Underwriters Conference, Inland Marine Underwriters Association, Insurance Executives Association, Life Insurance Association of America, National Association of Casualty and Surety Agents, National Association of Independent Insurers, National Association of Insurance Agents, National Association of Insurance Brokers, National Association of Mutual Insurance Agents, National Board of Fire Underwriters, National Fraternal Congress of America, and Surety Association of America. 1946 Proceedings, Nat'l Ass'n of Ins. Comm'rs 362-63 [hereinafter cited as Proceedings].

¹⁴² The model fire bill exempted ocean marine insurance, and the casualty bill exempted accident and health insurance. Hence, the American Institute of Marine Underwriters, the Bureau of Personal Accident and Health Underwriters, and the Health and Accident Underwriters Conference had no concern in these bills except to see that they retained these exemptions.

¹⁴³ The American Life Convention, the Life Insurance Association of America, and the National Fraternal Congress of America did not write fire or casualty policies.

¹⁴⁴ National Association of Insurance Brokers and National Association of Casualty and Surety Agents. Patterson, "At the Crossroads," *Best's Fire & Cas. News*, April 1947, at 32, 53; Brook, *supra* note 136, at 608 n.17.

¹⁴⁵ National Association of Insurance Agents.

judgment in accordance with their conception of the public interest. The fourth group represented the interests of mutual companies. Of the nine remaining organizations, three represented participating insurers.¹⁴⁶ Any legislation which would require or tend to establish uniform rates would work to the advantage, at least in the short run, of insurers operating on a participating basis. Although participating insurers may adhere to rates fixed by a bureau, they can ultimately undercut these rates by paying dividends to their policyholders. The remaining five members of the AIC represented fire and casualty companies which had been fixing their rates in concert.¹⁴⁷ From this description of the interests represented in the drafting of the model rate regulatory bills, it is clear that the interests of the rate bureaus dominated the picture.

B. *Model All-Industry Casualty and Fire Insurance Rating Bills*

After lengthy deliberation and extensive compromise regarding the degree of state legislative control required under the McCarran Act,¹⁴⁸ the joint NAIC and AIC committee agreed to submit two

¹⁴⁶ American Mutual Alliance, American Reciprocal Association, and Associated Factory Mutual Insurance Companies. Brook, *supra* note 136, at 608 n.19.

A participating insurer is one which distributes to its policyholders the excess of its funds over the amount necessary to meet its obligations and maintain solvency. Most participating insurers are mutual insurance corporations which have no capital stock and are owned by the policyholders, or reciprocal exchanges which are unincorporated associations organized to write insurance for members. Each member agrees to become liable for its share of losses and expenses of all members and authorizes an attorney-in-fact to effect its exchange of insurance with the other members. Some stock companies issue participating policies.

Probably the National Association of Independent Insurers should also be placed in the participating insurers' category since a majority of its members were participating carriers. Patterson, "At the Crossroads," *Best's Fire & Cas. News*, April 1947, at 32; S. Rep. No. 831, 87th Cong., 1st Sess. 5 (1961). Some of the other members of this association belonged to rating bureaus and others regularly wrote at bureau rates. Also, its membership either specialized in automobile insurance or wrote this line exclusively so one may say that the association was not truly representative of the independent insurers. Patterson, "At the Crossroads," *Best's Fire & Cas. News*, April 1947, at 32, 53-54.

¹⁴⁷ Association of Casualty and Surety Executives, National Board of Fire Underwriters, Surety Association of America, Insurance Executives Association, and Inland Marine Underwriters Association. Of the eighteen company members represented on the executive committee of the Association of Casualty and Surety Executives, twelve were affiliated with fire companies indicated in the *SEUA* case. This association was made up predominantly of companies which established rates through bureaus. *Id.* at 50-51. The National Board of Fire Underwriters is a trade association of stock insurance companies, which in the 1800's was a protagonist in rate making combinations, but which by 1944 conducted only indirect functions in bureau rate making. See Hearings, pt. 3, 1617-83.

¹⁴⁸ See Mertz at 162-63; 1946 Proceedings 102-36, 357-97; 1947 Proceedings 217, 410-13, for a discussion of the events leading up to the drafting of the all-industry bills and the matters considered in drafting the bills.

model bills to the states—the Fire, Marine,¹⁴⁹ and Inland Marine Rate Regulatory Bill and the Casualty-Surety Rate Regulatory Bill, commonly referred to as the all-industry bills.¹⁵⁰

The two bills are alike in their essential structure and may be discussed as one, although references to specific provisions and quotations are to the Fire, Marine, and Inland Marine Rate Regulatory Bill. These all-industry bills attempt to implement five basic principles which also have been the primary sources of litigation in the last two decades.

(1) All rates are determined in accordance with written schedules, based on experience, which are filed with the state. Section 3 of the bill provides:

(a) Rates shall be made in accordance with the following provisions:

. . . .

(3) Due consideration shall be given to past and prospective loss experience within and outside this state, to the conflagration and catastrophe hazards, to a reasonable margin for profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policy holders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, and to all other relevant factors within and outside this state

Section 4 provides:

(a) Every insurer shall file with the (commissioner) [a majority of states use this title, or a variation with the word "insurance;" four states use the title "superintendent of insurance"; and five use "director of insurance"]¹⁵¹ . . . , every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof, shall indicate the character and extent of the coverage contemplated and shall be accompanied by the information upon which the insurer supports the filing. A filing and supporting information shall be open to public inspection after the filing becomes effective.

(2) The services of every rating organization or advisory organiza-

¹⁴⁹ The term "marine" erroneously implies that ocean marine insurance was covered by the bill; it was not.

¹⁵⁰ Reference will be frequently made to the provisions of the All-Industry Bills (AIB). Unless the contrary is indicated, the reference is to the drafts of May 18, 1946, found in 1946 Proceedings 397-422. See 1947 Proceedings 226-27, for certain minor amendments.

¹⁵¹ Best's Insurance Reports—Fire and Casualty 1967 vi.

tion are available to every insurance company. A rating organization¹⁵² actually makes rates for its members; an advisory organization¹⁵³ makes recommendations to underwriters regarding rates. A rating organization may be licensed by the state, providing it files a copy of the organization's constitution and by-laws and a list of members with the commissioner and satisfies him that the organization is "competent, trustworthy and otherwise qualified to act as a rating organization"¹⁵⁴ Similarly every advisory organization is required to file with the commissioner a copy of its constitution and by-laws, a list of its members, and an agreement that the commissioner may inspect its operations.¹⁵⁵ No insurer which makes its own filing, nor any rating organization, is permitted to support its filings by statistics or to adopt rate recommendations furnished to it by an advisory organization which has not complied with the requirements of the bill.

(3) An insurer may file its own rates independently or adopt those of a licensed rating organization.¹⁵⁶ Furthermore, a participating carrier cannot be excluded from any rating organization which it desires to join. Section 6(c) provides:

No rating organization shall adopt any rule the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers.

The bills also allow insurers to deviate from the rates established by a rate bureau while remaining a member, for section 7 provides:

Every member of or subscriber to a rating organization shall adhere to the filing made on its behalf by such organization except that any such insurer may make written application to the (commissioner) for permission to file a deviation from the class rates, schedules, rating plans or rules respecting any kind of insurance, or class of risk within a kind of insurance, or combination thereof. Such application shall specify the basis for the modification and a copy thereof shall also be sent simultaneously to such rating organization. The (commissioner) shall set a time and place for a hearing at which the insurer and such rating organization may be heard Each deviation permitted to be filed shall be effective for a period of one year

The purpose of the one-year deviation is to prohibit so-called flash

¹⁵² AIB § 6.

¹⁵³ AIB § 10.

¹⁵⁴ AIB § 6(a).

¹⁵⁵ AIB § 10(b).

¹⁵⁶ AIB § 4.

filings—favorable filings made on behalf of a single or a few insureds and then withdrawn.¹⁵⁷

(4) Rates may not be “excessive, inadequate or unfairly discriminatory.”¹⁵⁸

(5) After the rate is filed with the insurance commissioner, the all-industry bills provide (a) that no premium schedule shall be effective until fifteen days after its filing;¹⁵⁹ (b) that the commissioner may extend this period of suspense for another fifteen days;¹⁶⁰ (c) that the commissioner may, before this period of suspense expires, disapprove any rate schedule if it is excessive, inadequate, or unfairly discriminatory, in which case it shall be ineffective;¹⁶¹ (d) that the commissioner may, after a schedule has become effective and either in response to a complaint or on his own motion, hold a hearing concerning the propriety of such schedule, and may, after such hearing, disapprove the schedule, either in whole or in part, so far as future transactions are concerned.¹⁶² If the commissioner fails to disapprove a filing within the waiting period or the extension, then the filing is deemed to meet the requirements of the act.¹⁶³ This provision is the so-called deemer clause: rates are deemed approved unless affirmatively disapproved by the commissioner.

C. *Alternative Proposals*

At least five proposals were made which differed in varying degrees from the NAIC-AIC bills. None of these proposals sought to effect as stringent a system of cooperative rate making as the all-industry legislation.

First, the Department of Justice proposed that property and casualty insurers pool their loss experience to establish uniform pure premiums—the amount necessary to pay losses, including a sum sufficient to maintain adequate reserves against conflagrations.¹⁶⁴ This information would provide credible statistical data for predicting future

¹⁵⁷ Hearings, pt. 2, 1257.

¹⁵⁸ AIB § 3(a). For a discussion of these terms see F. Crane, *Automobile Insurance Rate Regulation* 103-31 (1962); Klitzke, “Fire Insurance Rates and the Law,” 1956 *Ins. L.J.* 631, 645-46; Moser, “Operations of Independents under the Rate Regulatory Pattern,” 15 *Law & Contemp. Prob.* 523, 529-37 (1950).

¹⁵⁹ AIB § 4(d). This waiting period is to afford the commissioner time to examine a rate filing to determine whether it complies with the statutory standards.

¹⁶⁰ *Id.*

¹⁶¹ AIB § 5(a).

¹⁶² AIB §§ 5(c), (d).

¹⁶³ AIB § 4(d).

¹⁶⁴ Brief for Appellant at 109, *SEUA*, 322 U.S. 533 (1944).

loss probabilities without running afoul of the Sherman Act. Under this system insurers could even use the same gross rates as long as they did not agree to do so. Insurers could compete on such terms as agents' commissions, advertising outlays, administrative salaries, and profit margins. Attorney General Biddle pointed out that life insurers have operated under such a system for years.¹⁶⁵ Critics of this pure premium approach contended that it precluded flexibility and variations among carriers concerning such matters as territorial classifications, risk classifications, and methods of allocating expenses whose uniform method of computation was necessary to establish reliable statistical information. This allegedly would result in serious operational defects, weaken the solvency of many companies, encourage unfair dealing, and precipitate "unbridled rate competition and rate wars,"¹⁶⁶ although it is difficult to understand how all these ills would flow from the plan.

Second, the so-called brokers plan¹⁶⁷ proposed that the all-industry bills be the maximum control over rates that any state consider and that the minimum control require that rates be filed before immediate use. The state insurance commissioner could stop the use of rates found to violate standards adopted by the state after an administrative hearing. Each state would determine how much control along the regulatory spectrum was necessary to protect the public. This plan was designed to overcome several purported weaknesses of the all-industry bills such as the strict regulation of rates through prior approval which allegedly would produce uniform rates and favoritism toward direct writing, participating carriers who could return greater dividends to their policyholders since they paid no commissions to agents.¹⁶⁸ Some critics questioned whether the broker's plan provided the quantum of regulation necessary to invoke the McCarran Act's exemption from the federal antitrust laws.¹⁶⁹

Third, another plan with flexibility as its paramount aim suggested a law providing that rates be adequate, reasonable, and not unfairly discriminatory. Whether rates should be filed with the state was not important. The state insurance commissioner would be authorized to investigate rates on his own initiative to see if they met the three

¹⁶⁵ Life insurance rates are fixed by the companies on the basis of mortality experience, interest assumptions, and expense assumptions, together with competition. No rating bureaus or other industry agreements exist concerning rates. State reserve requirements take care of solvency problems. All life insurers do not, however, use the same pure premiums. Insurers which do not pay dividends use lower pure premiums than the others. Also insurers may use one of several mortality tables.

¹⁶⁶ Marryott, "Why Regulate Insurance?," *J. Am. Ins.*, Nov. 1946, at 46, 48.

¹⁶⁷ Dineen, "The AIC Bills and the Alternatives," *J. Am. Ins.*, Nov. 1946, at 27, 30.

¹⁶⁸ Sawyer, "Clearing The Record," *Best's Fire & Cas. News*, Jan. 1947, at 23.

¹⁶⁹ Dineen, *supra* note 167, at 30.

statutory standards and to issue cease and desist orders after an administrative hearing. The unique feature of the proposal was that any solvent carrier could receive approval from the insurance commissioner to use any rate, or net rate if a participating company, allowed for any other carrier. This would allow a company to meet immediately a competitor's rates. The plan was said to leave rates open to full and fair competition, permitting a company to change its rates as it pleased so long as they were reasonable, adequate, and not unfairly discriminatory.¹⁷⁰ A bill incorporating this plan was introduced in the Rhode Island legislature,¹⁷¹ but apparently was not enacted. Critics argued that this plan would foster discrimination by allowing insurers to quote varying rates to meet particular competitive situations and would drive out small, independent companies which survive by reflecting efficiencies of operation in their rates, but which would be injured by large competitors selling below cost.¹⁷²

Fourth, the Risk Research Institute, Inc., an association of insurance buyers for large firms, proposed that independent statistical bureaus be established or authorized by the state to provide "complete, interpretable data" to all interested persons.¹⁷³ Insurers could deviate from rates established by such bureaus by filing an alternative plan with the state insurance commissioner. Discriminatory rates would be regulated under federal antitrust laws. The Risk Research Institute contended that the all-industry bills would restrict and ultimately destroy competition among insurers, would foster the inefficiency of excessive government regulation, and would unlawfully allow insurers to fix prices.

Fifth, under the so-called California plan, state regulation of rates and rate-making activities was to be limited to an association of insurers who agreed to fix and maintain prices, subject to the approval of the insurance commissioner. Rating organizations were not to establish rates. Non-members were left unregulated except to the extent necessary to protect the public interest. Rates were to be filed with the state insurance commissioner for approval before their use.¹⁷⁴

D. *Appraisal of the Model Laws*

The dominant bureau interests on the NAIC-AIC joint committee prevailed in the drafting of the model laws. While the proposed legisla-

¹⁷⁰ Stone, "Rate Regulatory Legislation," *Best's Fire & Cas. News*, Dec. 1946, at 29.

¹⁷¹ Dineen, *supra* note 167, at 29-30.

¹⁷² Marryott, *supra* note 166, at 46; Dineen, *supra* note 167, at 30.

¹⁷³ "Buyers Offer Rate Bill," *Best's Fire & Cas. News*, March 1947, at 59; "Risk Research Report," *Best's Fire & Cas. News*, Dec. 1946, at 85.

¹⁷⁴ Dineen, *supra* note 167, at 29; Sawyer, *supra* note 168, at 23.

tion ostensibly provided insurers with competitive opportunities, the rate bureau interests later attempted to use the generality and flexibility of the bills to entrench their position. The purported strengths of the legislation in balancing the advantages of uniformity against the advantages of competition and in permitting independent operations were more illusory than real. To achieve a competitive atmosphere and to gain independence of action under the all-industry bills, carriers had to litigate. The alternative proposals offered a freer industry framework, but such freedom was resisted.

E. State Legislative Action

The great majority of the states adopted the all-industry bills either verbatim or in substance.¹⁷⁵ Most variations of the all-industry bills involve the deemer clause since the states had varying interpretations regarding how rates should be filed with the state to constitute regulation under section 2(b) of the McCarran Act. Three states adopted non-filing provisions for fire or casualty insurance, or both lines, but allowed the insurance commissioner to request that the rates be filed.¹⁷⁶ The California law specifically forbids agreements to adhere to rates. The Montana casualty law requires rate filing only for bureau rates. A number of jurisdictions adopted or retained laws permitting filings to become effective immediately, subject to subsequent disapproval—so-called file-and-use laws.¹⁷⁷ In New Hampshire rates may take effect immediately but with discretionary power in the commissioner to suspend any filing for up to thirty days after receipt, without a prior hearing.

Adoption of all-industry laws brought with it repeal of existing mandatory bureau laws, uniform rate laws, and other anticompetitive statutes in many, but not all, jurisdictions where they existed at the time of the *SEUA* decision. Mandatory bureau or uniform rate laws still remain in six states.¹⁷⁸ Provisions which require the state's express approval of rates prior to their use are also found in these states. Other jurisdictions also retained laws, primarily for workmen's compensation rates, which are more restrictive than the all-industry laws insofar as competition and independence of action are concerned.

¹⁷⁵ See Mertz at 225-26 for citations to the statutes in each state. In some states the present laws reflect amendments since their enactment in the late 1940's and early 1950's.

¹⁷⁶ California (fire and casualty), Missouri (casualty), and Idaho (casualty).

¹⁷⁷ Delaware, District of Columbia (casualty), Maine, Massachusetts (except compulsory automobile liability insurance), Ohio (casualty), and Wyoming.

¹⁷⁸ Louisiana (fire), Mississippi (fire), North Carolina (fire and casualty), Virginia (fire and casualty), Texas (fire and casualty), and the District of Columbia (fire).

Although the focus of this analysis is on rate regulation, one should note that following the McCarran Act the states drafted and adopted all-industry type bills for other areas of insurance regulation. State unfair trade practices acts were passed in fifty-two jurisdictions, including the District of Columbia and Puerto Rico. These acts prohibit such practices as misrepresentation and false advertising of policy contracts, defamation, boycott, coercion, intimidation, false financial statements, and rebates.¹⁷⁹ Twenty-two states and Puerto Rico have "Little Clayton" type legislation which generally provides that insurance companies may have interlocking directorates if competition is not substantially lessened or a monopoly created. Several acts also provide for acquisition of the capital stock of other insurers, subject to similar limitations.¹⁸⁰

The McCarran Act not only evoked state legislation in the areas of primary vulnerability under the federal antitrust laws, but it also triggered the development under NAIC and industry auspices of model legislation concerning credit life insurance, unauthorized insurers, and practices in the accident, health, and sickness lines of insurance.¹⁸¹

VII. MEANING OF "TO THE EXTENT . . . NOT REGULATED" OF SECTION 2(b) OF THE McCARRAN ACT

The NAIC, the AIC, and the states were clearly preoccupied with protecting concerted rate making practices of the property and casualty insurance industry from the federal antitrust laws. It was assumed, without any discussion, that state legislation fulfilled the requirement of the proviso of section 2(b) of the McCarran Act that the insurance industry be "regulated by State law." "Law" was assumed to mean "legislation." No one seemed concerned whether the states could effectively implement the all-industry legislation. Although the states had been charged with allowing their regulatory schemes to suffer from atrophy,¹⁸² no state appears to have attempted to increase the budget or staff of its insurance department or otherwise to strengthen its administration to implement the all-industry legislation.

A. Legislative History

This myopic approach of the states is rather surprising in light of the legislative history of the McCarran Act which indicates that state

¹⁷⁹ See Mertz at 170-71, 227-28.

¹⁸⁰ *Id.* at 172-73, 235.

¹⁸¹ *Id.* at 173-78, 230-35.

¹⁸² E. Patterson, *The Insurance Commissioner in the United States* (1927). The Report of the Senate Subcommittee on Antitrust and Monopoly charged state insurance departments with impotent regulation. S. Rep. No. 1834, 86th Cong., 2d Sess. (1960).

legislation is not sufficient to preclude the application of the federal antitrust laws. This legislative history rather clearly suggests that "regulated" means active, effective administrative regulation.

For example, on signing the McCarran Act President Roosevelt said:

After the moratorium period, the anti-trust laws . . . will be applicable . . . except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility It is clear from the legislative history and the language of this Act, that the Congress intended no grant of immunity for monopoly Congress did not intend to permit private rate fixing . . . but was willing to permit the actual regulation of rates by affirmative action of the States.¹⁸³

Attorney General Biddle also spoke for the administration:

The view we hold toward insurance is not unlike our policy toward railroad rates, that the fixing of rates by private groups . . . without active and definite state approval, is a clear contravention, not only of the [Sherman] act, but of the whole theory that underlies the act, the theory that competition should be free unless it is specifically regulated by the appropriate body.¹⁸⁴

The proviso of section 2(b) emerged from a conference consisting of Senators McCarran, Ferguson, O'Mahoney, and Representatives Sumners, Walter, and Hancock.¹⁸⁵ It represented a compromise between the Senate and House versions of the bill.¹⁸⁶ Since the House accepted the conference report without debate,¹⁸⁷ the only discussion of the proviso occurred in the Senate. The following colloquy took place on February 26:

Senator Ferguson: [I]nsofar as the State is concerned which has specifically legislated on the subject, the three acts [Sherman, Clayton, and Federal Trade Commission] shall not apply.

. . . .

Senator O'Mahoney: I believe that the Senator from Michigan went a little further than was his intention when he said that if the States have legislated certain things will take place. The bill says if the States have regulated.

. . . .

Senator Barkley: I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inade-

¹⁸³ The Public Papers and Addresses of Franklin D. Roosevelt: 1944-45 at 587 (Rosenman ed. 1950).

¹⁸⁴ Quoted in Dineen, "The Rating Problem," 1946 Proceedings, A.B.A. Sec. of Ins. L. 104, 105.

¹⁸⁵ 91 Cong. Rec. 1208, 1274, 1357 (1945).

¹⁸⁶ *Id.* at 1357, 1396, 1481-82.

¹⁸⁷ *Id.* at 1396.

quately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply.¹⁸⁸

Senator McCarran: That is my interpretation.^{188a}

Senator Pepper of Florida then objected to the conference report bill because it "Practically destroys the effect of the Supreme Court decision, and I am against that." Senator McCarran replied: "The Senator is correct regarding the 3-year moratorium, but beyond that he is in error."

Subsequently Senator McCarran wrote: "[T]he intent of the Act was not to accomplish any particular degree of stringency of regulation, but to keep regulation at the State level, and forestall Federal regulation . . ." On the other hand, he contemplated that the legislation must meet certain minimum standards to satisfy the proviso. Once these minimum requirements were met, the adequacy of state regulation was a matter of legislative, not judicial, concern.¹⁸⁹

The next day Senator Pepper contended that the conference bill enabled the states to evade the federal antitrust laws by mere legislation.¹⁹⁰ Also Senators Ferguson, Murdock, and O'Mahoney seemed to be of the opinion that if the states legislated, Congress should decide whether state regulation was such that the proviso of the McCarran Act shielded the particular activities.¹⁹¹

The statements of the Senators are ambiguous and the reported dialogue jumbled. The statements reflect the lack of precision in language inherent in extemporaneous speaking and perhaps the lack of careful thinking. Whether the Senators were talking about the adequacy of the scope of legislation, or about the adequacy of enforcement of the legislation, is not clear. Nevertheless, the legislative history of the McCarran Act rather strongly indicates that mere legislation, without effective implementation, does not preclude the application of the Sherman, Clayton, and Federal Trade Commission Acts.¹⁹²

¹⁸⁸ See also Senator Barkley's statement, *id.* at 1488.

^{188a} *Supra*, note 185 at 1443-44.

¹⁸⁹ Letter to Yale Law Journal, quoted in Note, "State Supervision over Insurance Rate-Making Combinations under the McCarran Act," 60 Yale L.J. 160, 163 n.11 (1951). See also McCarran, "Federal Control of Insurance," 34 A.B.A.J. 539, 542 (1948); McCarran, "Insurance as Commerce—After Four Years," 23 Notre Dame Law. 299, 306 (1948).

¹⁹⁰ 91 Cong. Rec. 1444 (1945).

¹⁹¹ *Id.* at 1477-83.

¹⁹² *Contra*, Morris, "Meaning of Term 'Regulated by State Law' in Public Law 15," 1949 Proceedings, A.B.A. Sec. of Ins. L. 213, 221-22. Morris argues that the term

B. *Judicial Interpretations*

The courts have not followed the legislative intent regarding the meaning of the words "regulated by State law." In considering the meaning of these words, the courts have viewed the phrase in the context of two different issues. The first issue is whether, by enacting statutes covering certain insurance activities which would otherwise be subject to federal law, the states have in fact "regulated" such activities, or whether effective administration of such statutes is a prerequisite to regulation. The decisions indicate that the mere existence of state legislation is sufficient.

*North Little Rock Transp. Co. v. Casualty Reciprocal Exch.*¹⁹³ was the first reported decision involving the meaning of "regulated." The court, however, did not attempt to probe the definition of the word. In affirming a summary judgment for the defendant against the allegation of a combination in restraint of trade,¹⁹⁴ no inquiry was made beyond the fact that the state had a statute which authorized the licensing of rating bureaus. It was simply assumed that the state had regulated whenever it legislated.¹⁹⁵

In a similar approach, the mere existence of a general state anti-trust statute has been held sufficient to constitute regulation within the meaning of the McCarran Act's section 2(b) proviso.¹⁹⁶ The Department of Justice, however, has expressed the opinion that a state antitrust law does not suffice as regulation under section 2(b),¹⁹⁷ while the FTC has said that such a law is tantamount to regulation.¹⁹⁸

Although not involving rate regulation, several decisions concerning activities of mail order accident and health companies discuss whether "regulated" means merely legislation or active, effective administration of such legislation.

"regulated" forecloses an inquiry into the effectiveness of state enforcement. He reasons that since Congress used the term in the general sense, it did not mean for federal regulation to overlap where a state acted to occupy the area and did not intend to embarrass state administration.

¹⁹³ 181 F.2d 174 (8th Cir.), *cert denied*, 340 U.S. 823 (1950). *Accord*, *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass.), *aff'd, per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

¹⁹⁴ 85 F. Supp. 961 (E.D. Ark. 1949).

¹⁹⁵ *But see* Note, "State Supervision over Insurance Rate-Making Combinations under the McCarran Act," 60 Yale L.J. 160 (1951).

¹⁹⁶ *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 175 F. Supp. 857 (N.D. Calif. 1959); *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 278-80 (D. Mont. 1958).

¹⁹⁷ Hearings, *supra* note 36, pt. 2, 939-40.

¹⁹⁸ *Id.* at 953-55.

In two cases¹⁹⁹ the courts rejected the FTC's contention that the states were not actively regulating the challenged activities within the meaning of section 2(b) of the McCarran Act. Both courts considered state regulation synonymous with state legislation.²⁰⁰ When the Supreme Court considered these cases on certiorari,²⁰¹ it also rejected the FTC's argument that the states had not regulated within the meaning of the section 2(b) proviso. The Court stated:

Petitioner also argues . . . that . . . exercise of Commission authority in these cases should be upheld because the States have not 'regulated' within the meaning of the Section 2(b) proviso. This argument is not persuasive in the instant cases. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provisions here under review were mere pretense. Rather, it urges that a general prohibition designed to guarantee certain standards of conduct is too 'inchoate' to be 'regulation' until that prohibition has been crystalized into 'administrative elaboration of these standards and application in individual cases.' However, assuming there is some difference in the McCarran-Ferguson Act between 'legislation' and 'regulation,' nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner. So far as we can determine from the records and the arguments in these cases, the proviso of Section 2(b) has been satisfied.²⁰²

One may construe the Court's language two different ways: Did the Court mean "satisfied" because the statutes were not a pretense since they authorized enforcement through a scheme of administrative supervision, or because there was in fact supervision? It is not clear whether the Court relied on the existence of state regulatory legislation, or on the effectiveness of such regulation, as the controlling factor. In a subsequent case a district court cited the *National Cas. Co.* decision for the proposition that "a state regulates the business of insurance . . . when a State statute generally proscribes or permits or authorizes certain conduct on the part of the insurance companies."²⁰³

A similar ambiguity is found in the decision in *Allstate Ins. Co. v.*

¹⁹⁹ *American Hosp. & Life Ins. Co. v. FTC*, 243 F.2d 719 (5th Cir. 1957), *aff'd*, 357 U.S. 560 (1958); *National Cas. Co. v. FTC*, 245 F.2d 883 (6th Cir. 1957), *aff'd*, 357 U.S. 560 (1958).

²⁰⁰ 243 F.2d 719, 723 (5th Cir. 1957); 245 F.2d 883, 888 (6th Cir. 1957).

²⁰¹ *FTC v. National Cas. Co.*, 357 U.S. 560 (1958).

²⁰² *Id.* at 564-65.

²⁰³ *California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co.*, 175 F. Supp. 857, 860 (S.D. Cal. 1959).

Lanier.²⁰⁴ This case represents the only major attack upon any state rating law since the passage of the McCarran Act. In the *Allstate Ins. Co.* case the court was asked to nullify a North Carolina statute which compelled all authorized automobile liability insurers to become members of a rating bureau from which there could be no deviation in rates except through charging rates higher than the minimum set by the bureau. The basis of the challenge to the North Carolina statute was that it violated section 3(b) of the McCarran Act, since it allegedly amounted to coercion or intimidation of private insurance companies and restrained competition under the Sherman Act, which has continuing application to the insurance business in the absence of state regulation.

In refusing to interfere with the state legislature's discretion to forbid forms of competition which it deemed undesirable, the district court held that a state may legislatively validate actions and procedures which, if conducted on a voluntary basis without state regulation, might violate the Sherman Act. The bar against acts of boycott, coercion, or intimidation imposed by the Sherman Act and made applicable to the business of insurance under the McCarran Act was held inapplicable to the legislative action taken by the state in furthering its regulatory scheme. In so holding the court relied upon the proviso of section 2(b) of the McCarran Act. The reasoning employed was that a scale of operation exists in which to legislate; the scale beginning at its maximum end, with the state exercising full control over the insurance industry by excluding all private insurers and the state becoming the only insurer. As the state diminishes its control, a certain point is reached on the scale where a vacuum is created which the federal government must fill. The McCarran Act was designed to show the states where this point is on the theoretical scale.²⁰⁵

The indicia of control sufficient to negate private coercion and intimidation and to constitute adequate state control were (1) the degree of control the commissioner of insurance has over the North Carolina rate bureau; (2) the right of dissatisfied members to appeal to the commissioner and to receive permission to deviate from the bureau's filing by an upward deviation; (3) the right of dissatisfied members to protest to the commissioner concerning any determination made by the rate bureau, which is required to hold a hearing before revising rates; and (4) the right of members to compete freely in such

²⁰⁴ 242 F. Supp. 73 (E.D.N.C. 1965), *aff'd*, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966). For a discussion of the case *see* Note, "Antitrust—Insurance—Compulsory Rating Bureaus," 45 N.C.L. Rev. 481 (1967).

²⁰⁵ 242 F. Supp. 73, 88 (E.D.N.C. 1965).

nonprohibited ways as paying dividends and giving increased service.

Because the court focused on the statutory indicia of control, one may argue that it considered this sufficient regulation under the McCarran Act. There was no discussion of the actual control or activities of the state under its statutes. On the other hand, in affirming the district court's decision, the court of appeals emphasized that the rating bureau was established and administered "under the active supervision of the State."²⁰⁶ In focusing on the alleged "active" state regulation, the court of appeals relied upon the exemption from the Sherman Act under *Parker v. Brown*, rather than on section 2(b) of the McCarran Act. But even though the court of appeals referred to the "active supervision of the State," it focused only on the extent of the powers of the state, and in particular those of the insurance commissioner. The more difficult question, alluded to by the FTC in the *National Cas. Co.* case, is whether the regulation is in fact vigorous, rather than just inchoate. The court of appeals in the *Allstate Ins. Co.* case failed to consider this point. Although the North Carolina commissioner may have extensive statutory powers, he may act as a rubber stamp or may merely perform the ritual of regulation without doing anything else.

These decisions, indicating that state legislation constitutes regulation within the meaning of the section 2(b) proviso of the McCarran Act, seem erroneous. Such a rationale offers an easy formula for the solution of jurisdictional conflicts: If a state statute covers the practice involved, the state's jurisdiction is deemed exclusive. From a public policy viewpoint, effective administration of such legislation should be a prerequisite to state regulation. Since state regulatory machinery lags behind its statutory framework in nearly every state,²⁰⁷ a regulatory vacuum is created, not effectively reached by the states and into which the federal government cannot enter. Since the property and casualty insurance industry constitutes a substantial segment of the national economy and is imbued with the public interest, it should not be allowed to operate outside both state and federal control.

The precedents are somewhat ambiguous concerning whether "reg-

²⁰⁶ 361 F.2d 870, 871, 872 (4th Cir. 1966). The United States filed a memorandum in the district court urging invalidation of the North Carolina program on the ground that it permitted the unsupervised establishment of minimum premiums by private companies, that is, that the state had failed to come up to the extent of regulation required by the McCarran Act. 242 F. Supp. 73, 83 (E.D. N.C. 1965). Following the district court's decision, the United States did not join in the appeal. 361 F.2d 870, 872 n.2 (4th Cir. 1966).

²⁰⁷ See S. Rep. No. 1834, 86th Cong., 2d Sess. (1960), regarding the problems of inadequate staffs and budgets, high personnel turnovers, the low level of expertise, and the like, in state insurance departments.

ulated" means the enactment of legislation providing for a regulatory scheme or the active, effective implementation of such a scheme. Similarly, the relatively few decisions concerning the second issue involving the meaning of the words "regulated by State law"—the jurisdictional boundaries of a state's regulation over interstate insurance activities—are equally ambiguous in defining the outer limits of a state's jurisdiction. Although the major case involves the regulation of an accident and health mail order insurer,²⁰⁸ and not rate regulation, the precedent is still relevant.

In *FTC v. Travelers Health Ass'n*²⁰⁹ the Supreme Court considered the application of the Federal Trade Commission Act to an insurance company which, though licensed in only two states, conducted a mail order business throughout the country. This issue was not considered by the Court in the *National Cas. Co.* case since only an insubstantial amount of mail advertising was involved. The insurer engaged in a strictly mail order business, originating from its Nebraska home office. It sent letters into all states, but was licensed only in its home state of Nebraska and Virginia. At the time the FTC proceeding was commenced, the Unfair Practices Act of Nebraska did not expressly cover false advertising practices outside the state, but the Nebraska law was amended while the proceeding was pending.

The FTC argued that the states into which advertising material was mailed were powerless to deal with the problem effectively. Rejecting this contention, the Court of Appeals for the Eighth Circuit noted that all the transactions were consummated in Omaha. The practices in question were held to be regulated by Nebraska law, and were thus shielded from the regulatory powers of the Commission.²¹⁰

On certiorari, the Supreme Court held that Nebraska could not be considered to regulate the practices of the insurer to preclude the possible application of the Federal Trade Commission Act. The Court reasoned that a state cannot regulate the practices of an insurance business affecting residents of other states.²¹¹ But the Court did not rule whether the insurer's advertising practices were regulated by the

²⁰⁸ For an exhaustive analysis of the constitutional authority of the states to regulate and tax unauthorized mail order insurers, particularly accident and health companies, and of the methods by which the states can make effective their regulation, see Hanson & Obenberger, "Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business," 50 Marq. L. Rev. 175 (1966).

²⁰⁹ 362 U.S. 293 (1960).

²¹⁰ The dissent emphasized: "I do not believe . . . that the after-the-fact amendment . . . is the kind of regulation by state law Congress had in mind." 262 F.2d 241, 245 (8th Cir. 1959).

²¹¹ *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 301-02 (1960).

states in which it conducted its mail order business, because the court of appeals "gave no consideration to the effect of 'regulation' by any state other than Nebraska."²¹² Arguably, as the dissent points out,²¹³ the majority opinion emphasizes the effectiveness of such regulation, rather than the existence of a statutory scheme, since the majority reserved, "for what they are worth,"²¹⁴ the questions that would arise were a state outside Travelers Health's home state to legislate against an out-of-state insurer mailing advertising into its jurisdiction.

Upon remand,²¹⁵ the court of appeals considered this issue. While recognizing that any state could subject the company to its jurisdiction, consistent with due process, for purposes of a cease and desist order, it felt that the state would still lack "the ultimate compulsiveness"²¹⁶ to regulate within the meaning of section 2(b) of the McCarran Act. Since the case did not go back to the Supreme Court, one does not know whether the Court would agree with the interpretation of the court of appeals.

Another aspect of this problem is whether the mere licensing of national rate bureaus or advisory organizations, which are based in a foreign jurisdiction but which in effect set rates in other jurisdictions, gives the state enough "ultimate compulsiveness" to satisfy the standard expressed by the Supreme Court in *Travelers Health Ass'n*. Although one may argue that the licensing of a bureau or advisory organization and the mere presence of agents is not enough,²¹⁷ it would seem that the necessary quantum of compulsiveness for state regulation exists. The critical factor in *Travelers Health Ass'n* was whether there existed the "ultimate compulsiveness" of state regulation over an insurer's advertising in the state where the advertising had its impact. Such "ultimate compulsiveness" clearly exists with respect to activities of an insurer which is licensed by the state. The licensing submits the insurer to the full measure of the state's regulation regardless of whether the advertising originated outside the state and is sent into the state for distribution by local agents or is mailed in the state directly to the public. Neither the source of the advertising nor its method of dissemination in any way should diminish the regulatory power of the licensing state.

In the only case involving rate regulation having interstate impli-

²¹² *Id.* at 299 n.4.

²¹³ *Id.* at 305.

²¹⁴ *Id.* at 299 n.4.

²¹⁵ *Travelers Health Ass'n v. FTC*, 298 F.2d 820 (8th Cir. 1962).

²¹⁶ *Id.* at 824.

²¹⁷ Palmer, "Federal Trade Commission Jurisdiction over Insurance Advertising," 1964 *Ins. L.J.* 69.

cations, the court followed the *Travelers Health Ass'n* decision in denying motions to quash subpoenas duces tecum.²¹⁸ The motions were made by the Associated Aviation Underwriters (AAU) and the Aviation Insurance Rating Bureau (AIRB). AAU is an association of insurance companies which, in effect, conducts the business of member insurers insofar as aviation risks are concerned. The association handles various types of coverage, including aircraft hull insurance, aircraft personal injury and death insurance, property liability insurance, personal accident insurance, and general liability insurance—which consists of airport liability, airline ground, and products liability insurance. The vast majority of the contracts of insurance entered into by AAU arise in New York. AIRB is a rating organization formed under the laws of New York. Membership is open to any capital stock insurer authorized to write insurance, for which AIRB prescribes rates, including aircraft hull insurance, passenger liability insurance, aircraft property damage liability insurance, and employers' aviation indemnity insurance. The constituency of both AAU and AIRB is apparently the same. The Antitrust Division of the Department of Justice was investigating alleged price fixing agreements among members of both groups. The movants asserted that section 2(b) of the McCarran Act precluded the issuance of the subpoenas since the practices being investigated were regulated by their domiciliary state, New York. Only five states, California, Montana, New Jersey, New York, and North Carolina, had statutes regulating aircraft hull and casualty or liability insurance. In addition, AIRB admitted that it was only licensed in these five states since the other forty-five states exempted aviation insurance from their rate regulatory statutes. New York's regulation was found not to be effective to oust the Antitrust Division of its jurisdiction.²¹⁹

The opinion follows the language of the Supreme Court in *Travelers Health Ass'n* that "the state regulation which Congress provided should operate to displace this federal law [the Federal Trade Commission Act] means regulation by the State in which the deception is practiced and has its impact."²²⁰ While holding that the activities of

²¹⁸ *In re Grand Jury Investigation of Aviation Ins. Indus.*, 183 F. Supp. 374 (S.D. N.Y. 1960).

²¹⁹ See also *United States v. Associated Aviation Underwriters*, 65 Civ. No. 2400, S.D.N.Y., Aug. 5, 1965, and *United States v. United States Aviation Underwriters, Inc.*, 65 Civ. No. 2401, S.D.N.Y., Aug. 5, 1965, which are actions against the nation's two largest aviation underwriting pools. The complaints allege that the underwriting pools violate the Sherman Act.

²²⁰ *In re Grand Jury Investigation of Aviation Ins. Indus.*, 183 F. Supp. 374, 379 (S.D.N.Y. 1960).

AAU and AIRB are practiced and have their impact in all states, unfortunately the court failed to set forth its analysis of the necessary elements to support its holding. The conclusion was that those states which exempt various aspects of aviation insurance from their statutes fail to regulate within the meaning of the McCarran Act. Since the vast majority of states do not have statutes governing aviation insurance, no consideration was given to whether mere legislation constitutes regulation. The court added that in light of the Supreme Court's decision in *Travelers Health Ass'n* and the failure of many states to regulate at all, the issue of whether activities which are essentially concerned with interstate or foreign commerce can be the subject of state control, and thus exempt from federal control, was not before the court. Thus the decision does not define the extent that the New York statutes regulate the aviation insurance industry.

In *United States v. Chicago Title & Trust Co.*²²¹ the court held that Chicago Title's acquisition of substantially all the stock of Kansas City Title was not regulated by state law under the McCarran Act. Neither Illinois, where Chicago Title had its principal office and the only state where it was licensed to do business, nor Missouri, the home state of Kansas City Title, had antitrust statutes comparable to section 7 of the Clayton Act,²²² which applied to the merger. The Illinois antitrust statute had been construed not to apply to combinations with parties outside the state nor to the business of insurance. Although Missouri had a comprehensive antitrust law, which empowered the state to issue an injunction to liquidate an insurer, the statute applied only to corporations licensed to do business in the state. Similarly, with regard to those states other than Missouri and Illinois in which the merger had an effect and which had statutes pertaining to stock acquisitions, there could be no enforcement of such statutes since Chicago Title was not licensed to do business in those states. Thus, although a state may have the power to proscribe certain activities of out-of-state insurers, it must also have the means to implement such power for there to be regulation under the McCarran Act. Lamentably, the decision does not sharply delineate the boundaries of a state's power and the means of implementing that power over an insurer's

²²¹ 242 F. Supp. 56 (N.D. Ill. 1965). The case was subsequently disposed of by a consent decree entered May 23, 1966. 1966 CCH Trade Cases para. 71,745 (N.D. Ill.).

²²² Section 7 of the Clayton Act provides, in part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (1964).

multistate activities. Instead, general support for the court's conclusion came from the Congressional debates pertaining to the McCarran Act, the Supreme Court's opinion in the *Travelers Health Ass'n* decision, and the Eighth Circuit's opinion, upon remand, in *Travelers Health Ass'n*.

Recently the scope of state regulation may have been significantly widened. In *Ministers Life & Cas. Union v. Haase*²²³ the Wisconsin Supreme Court upheld the state's statute asserting the state's jurisdiction to regulate the mail order solicitation of business by unauthorized insurers among Wisconsin residents.²²⁴ However, the existence of a parallel similar to restraints of trade is less certain, that is, between regulatory jurisdiction assumed by the states and the degree of control constituting regulation necessary under section 2(b) of the McCarran Act to displace the Sherman, Clayton, and Federal Trade Commission Acts. The major obstacle is the ability of the state in which the impact of the practices of an out-of-state insurer, rate bureau, or rate advisory organization occurs to enforce meaningfully orders which would flow from the exercise of its assumed jurisdiction when the entity is "present" in the state in the sense that such jurisdiction constitutionally may be acquired. Since the Supreme Court of the United States dismissed the appeal in the *Minister Life & Cas. Union* case, one does not know whether the Court agrees with the reasoning of the court of appeals upon remand in the *Travelers Health Ass'n* case, where it was held that attempted regulation of such out-of-state parties by the state where the impact occurs lacks the "ultimate compulsiveness" needed to achieve state regulation within the meaning of section 2(b).

VIII. AFTERMATH OF THE ALL-INDUSTRY RATING BILLS

From this general description of the all-industry pattern of regulation, it would seem that opportunities for price competition had been adequately assured through provisions allowing for independent rate filings, permitting deviations from bureau rates, making affiliation with a rating bureau voluntary, requiring rating bureaus to permit all authorized insurers to subscribe to their services, requiring all material data on rates to be matters of public record, and granting the insurance commissioners continuing supervision over internal affairs of rating bureaus at the request of members or subscribers who are not satisfied with the bureau's action. Furthermore, the purpose clauses of the bills

²²³ 30 Wis. 2d 339, 141 N.W.2d 287, *appeal dismissed*, 385 U.S. 205 (1966).

²²⁴ For an extensive discussion of *Ministers Life & Cas. Union v. Haase*, see Hanson & Obenberger, "Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business," 50 Marq. L. Rev. 175 (1966).

recognize the role of reasonable price competition and declare that the bills should be liberally construed. A meaningful evaluation of these opportunities for price competition is possible, however, only after consideration of the problems encountered by individual insurers in their efforts to compete on a price basis.

Some observers foresaw the problems posed by the all-industry legislation. They charged that the all-industry laws were not in the public interest because (1) they imposed burdensome filing requirements which would stifle price competition and increase the expense of independent insurers in making the various filings required by the bills; (2) they imposed cumbersome deviation procedures upon rate bureau members which deviations could be shelved by a bureau's lengthy internal procedure and objections before a commissioner; (3) they would tend to increase the difficulties poor risks would have in obtaining coverage by imposing uniform rates made for the average or below average risk; (4) they would tend to cause uniform insurance coverage with a consequent lessening of the scope for the development of new coverages; and (5) they would increase the cost of doing business for all insurers.²²⁵

A. *State Decisions Dealing with Competition*²²⁶

The cases dealing with the accommodation under the rating laws of the philosophies of competitive rate making versus cooperative rate making reveal the problems inherent in the all-industry bills. The litigation also exemplifies the observation that "traditional habits of thought which had preserved for many years had encrusted" the fire insurance industry "with attitudes stifling progress and hostile to new ideas."²²⁷

The focus of this analysis is primarily upon judge-made law, only because such law is more accessible than administrative law. Administrative practice and procedure probably are of greater significance than judicial decisions in rate regulation, for (1) courts rarely overturn the rulings of an insurance commissioner; (2) the commissioner is often able to enforce a ruling that could be upset by litigation; (3) some

²²⁵ Brook, "Public Interest and the Commissioners'-All Industry Laws," 15 *Law & Contemp. Prob.* 606 (1950). See also Patterson, "At the Crossroads," *Best's Fire & Cas. News*, April 1947, at 32.

²²⁶ A rather disjointed discussion of post all-industry cases is found in Mertz *supra* note 123. This heading and the subheadings under it, as well as portions of the discussion, are taken from the Mertz article.

²²⁷ McHugh, "Rate Regulation Revisited: The Point of View of a Federal Official," in *Insurance and Government* 385, 390 (Center & Heins eds. 1962). See also Hearings, *supra* note 36, pt. 2, 1132-33, 1174, 1246.

states give the commissioner blanket power to make regulations to carry out the spirit of the insurance law, while others give him much more limited, but still extensive, power; and (4) the commissioner may accomplish much through moral suasion.²²⁸ Still judge-made law is important.

1. Resistance to Deviations

During the decade beginning in 1947, the utility of deviation filing as a vehicle for strenuous competitive action was vigorously attacked. Before the commissioner could approve the deviation filing under the all-industry bills, he had to notify the rating bureau, which had the right to be heard in opposition to the deviation. Some bureaus had a policy of challenging all deviation applications.²²⁹ The records of the 1959 hearings of the Senate's Subcommittee on Antitrust and Monopoly reflect the experiences of at least fifteen companies, each of which had been opposed repeatedly in protracted hearings and litigation in various states.²³⁰ In addition, since a deviation filing was operative for only one year, its effectiveness as a competitive measure was uncertain because the rating bureau, which had the right to request annual hearings, was often able to prevent a company from keeping its deviation in continuous effect. The necessity of justifying a deviation filing each year imposed a financial burden on an applicant which few companies could bear.

An example of the frustrations encountered by carriers which choose to deviate from the rates of an industry group is illustrated in a case²³¹ which arose under an all-industry type law and involved the Insurance Company of North America (INA), a large independent carrier. Each year from 1947 to 1950 INA and the Philadelphia Fire and Marine Insurance Company applied for permission to deviate from fire insurance rates filed by the Cook County Inspection Bureau. The bureau waived hearings and the Illinois director of insurance approved the deviations. But when the inspection bureau reduced its rates in September 1951, it challenged the director's order allowing deviations from such rates. The bureau unsuccessfully sought to overturn the director's decision in the local circuit court and the Illinois Appellate Court. Although the deviation was allowed, INA and the Philadelphia Fire and Marine Insurance Company were the victims of harassing

²²⁸ E. Patterson, *Essentials of Insurance Law* 12-16 (2d ed. 1957).

²²⁹ Hearings, pt. 2, 1164.

²³⁰ Hearings, pt. 2, 1121-75, 1291-369; pt. 4, 2134-73. *See also* Comment, 58 Mich. L. Rev. 730 (1960).

²³¹ *Cook County Inspection Bureau v. Day*, 359 Ill. 459, 110 N.E.2d 874 (1953).

litigation because in March 1953 the appellate court dismissed the appeal, pointing out that the question was moot since the director's order approving the deviation had expired in September 1952 under the provision of the all-industry bill which makes deviations effective for only one year.

Many other instances have occurred where the converse problem has arisen, that is, where deviations or renewals of deviations have been denied. But appeals have not been taken principally because of the short-lived value of a court decision upholding a particular deviation.²³²

In spite of the resistance to deviations by rate bureaus, the number of deviations increased significantly²³³ and with this increase came increasing judicial support for various forms of the practice. In *Liberty Mut. Fire Ins. Co. v. Commissioner of Ins.*²³⁴ the court overturned an insurance department ruling that the company could not proceed by deviation in seeking approval of an optional one hundred dollar wind-storm deductible endorsement at a twenty-five percent premium reduction; the bureau only provided for a fifty dollar deduction. There is a difference between the language of the fire and casualty deviation sections of the all-industry legislation. Liberty Mutual was acting under the broader language of the fire deviation provision which does not require a uniform deviation, as contrasted with the stricter casualty section which permits only "a uniform percentage decrease or increase to be applied to the premiums produced by the rating system." The argument was rejected that the company had failed to exercise its statutory right of appeal to the state insurance commissioner from the action of a rating organization's approving or rejecting any proposed change to the organization's filing. Liberty Mutual could seek a deviation for itself by making a written application to the commissioner.

One important administrative ruling in this area was that of the New York Insurance Department in July 1959. In this proceeding²³⁵ the superintendent of insurance granted a fifteen percent fire and extended coverage deviation by Allstate for commercial fire insurance, based upon a fifteen percent prospective saving in expenses and a prospective loss ratio approximating the average of all companies. The

²³² See McCullough, "Insurance Rates in the Courts" (pts. 1-2), 1961 Ins. L.J. 381, 475.

²³³ Dirlam & Stelzer, "The Insurance Industry: A Case Study in the Workability of Regulated Competition," 107 U. Pa. L. Rev. 199, 206 (1958); Hearings, pt. 7, 4146-54.

²³⁴ 340 Mass. 413, 164 N.E.2d 908 (1960).

²³⁵ In the Matter of Allstate Ins. Co. Application for a Uniform Deviation of 15% from Fire and Extended Coverage Rates of the NYFIRI for Classes Other than Dwellings or Contents, Homeowner's Policies and Other Excluded Classes. See Mertz at 209.

New York Fire Insurance Rating Organization (NYFIRO) argued that this was illegal in that a deviation cannot be based on prospective expense savings.²³⁶ The ruling offers encouragement to insurers to enter new areas of underwriting while not being saddled with a bureau's rates. If the insurer can demonstrate prospective economies, the commissioner may support the insurer's optimism.

2. Independent Filings and Partial Subscribership

Partly because of procedural obstacles and pitfalls as well as limitations on the kinds of variations and innovations possible under the deviation provisions, the idea of resigning from the bureaus, where possible, and making independent filings, became more attractive to competitive-minded companies. As INA reported at the end of 1954, it came to the conclusion in 1953 that it had to become independent of rating organizations with respect to the more sought-after classes of business. Its purpose was to deal more effectively with competitive abuses which were not in the public interest. A direct result of its action was a stronger position for its agents and INA through lower costs and improved policy forms and methods. In 1954, INA reported that its independent rates for fire insurance on dwellings became effective in twenty-eight states and in five of them a simplified dwelling policy and rating plan was introduced with savings to policy holders of about ten percent in premiums.²³⁷ Efforts by INA and other major insurers to act independently produced a collision with the rate bureaus over conflicting interpretations of the all-industry laws. The decisions that resulted constitute important benchmarks in the post-McCarran Act era.

The first test-case occurred in New York where INA resigned its subscribership from the NYFIRO for most dwelling classes, made independent filings, and obtained approval for such rates, while remaining a subscriber for commercial insurance and for certain dwelling classes.²³⁸ The New York rating laws, which are substantially similar to the all-industry type, permitted subscribership to a fire rating bureau for any kind of insurance, subdivision, or class of risk written by fire insurers. NYFIRO petitioned the New York insurance department to withdraw its approval of INA's filings on the grounds that INA could

²³⁶ For a list of citations involving NYFIRO's opposition to INA's and Allstate's competitive moves in New York State, see Epes, "Rate Regulation Revisited: The Views of W. Perry Epes," in *Insurance and Government* 338, 345 n.50 (Center & Heins eds. 1962).

²³⁷ Insurance Company of North America, 163rd Annual Report, at 10 (1954).

²³⁸ See Hearings, pt. 2, 1167-75; pt. 4, 2020-22, 2028.

not file independently for some fire classes and subscribe to NYFIRO for others and that INA had violated NYFIRO's property rights by "appropriating" and using bureau material in INA's dwelling filings. The insurance department summarily rejected both arguments and sustained the filing and the right of partial subscribership.²³⁹

In 1955, the Pacific Fire Rating Bureau, after considering but deciding against the complete exclusion of INA, adopted and filed with several state insurance departments a rule which would have destroyed the right of partial subscription under the all-industry type laws. The effect of the rule was that companies desiring to file independently in class-rated fields would be able to do so only by being deprived of bureau services in the schedule-rated fields. The class-rated fields are where a common premium is fixed for a group of insureds having approximately the same expected losses and expenses. The schedule-rated fields are a modification of class rating on the basis of a comparison between some specified characteristics of a standard insured and the corresponding characteristics of the insured who is being rated. The companies valued the latter services and wished to continue to subscribe to them. INA and the Fire Insurance Exchange of Los Angeles attacked the rule in several states. Ultimately, in 1958, the rule was held invalid by the Supreme Court of Arizona.²⁴⁰

When the independently filed fire dwelling rates of INA came under attack in New York, the superintendent again rejected the position of the rate bureau and commented:

It seems to me that in the case of an independent filing or a deviation filing, expense savings from whatever legitimate source or by whatever legitimate method may be passed on to the public in the form of lower rates. NYFIRO incorrectly states that 'the purpose of the 1948 amendments to the rating law was primarily to preserve the status of the Rating Bureaus.' Section 180 of the Insurance Law provides at the very beginning that the main purpose is 'to promote the public welfare'; and secondarily and in aid of such purpose to provide cooperative action. There is nothing in the Law which says that the rating bureaus shall be paramount. To hold otherwise would not be in the public interest. As a matter of fact, competition in the public interest is encouraged. What is meant by competition is that it shall be clean, open and reasonable. There is no mischief in that kind of competition.²⁴¹

²³⁹ In the Matter of the Independent Fire Filings of the Ins. Co. of N. Am. for Dwelling Classes 009, 019, 029, and 011, N.Y. Ins. Dept., Sept. 14, 1954, *aff'd, without opinion sub. nom. Cullen v. Bollinger*, 136 N.Y.S.2d 361 (Sup. Ct., App. Div. 1954), *appeal dismissed*, 350 U.S. 803 (1955).

²⁴⁰ *Pacific Fire Rating Bureau v. Insurance Co. of N. Am.*, 83 Ariz., 369, 321 P.2d 1030 (1958).

²⁴¹ Quoted in Epes, "Rate Regulation Revisited: The Views of W. Perry Epes," in

The decisions in New York and Arizona, upholding independent filings and partial subscribership, have significance not only in terms of the issues specifically resolved, but also in their treatment of the role and function of the rating organization mechanism. In substance the bureau counsel in those cases urged that the primary purpose of the rating law provisions adopted after the McCarran Act was to preserve the "status" of the bureaus, that the uniform pattern of rates and coverages set by the bureau must remain paramount, and that competition should be permitted only to the extent that it does not materially weaken bureau status or disrupt bureau patterns. For example, the bureau's brief in *Pacific Fire Rating Bureau* depicted rating organizations as quasi-government agencies needed to assist the commissioner in administering the law. It urged that bureau rules, like those of an administrative agency, carry a strong presumption of validity, which the commissioner can overcome only by an affirmative showing that the rules are "clearly illegal, or plainly and palpably inconsistent with law."²⁴² These arguments were not persuasive to the Arizona Supreme Court. The qualified antitrust exemption granted insurance rating organizations the privilege to make rates cooperatively; "partial subscribership and deviation . . . are provided so that competitive rates may inure to the benefit of the public."²⁴³ The bureau rule restricting subscribership was held invalid and could not lawfully be approved by the insurance commissioner because it "obviously precludes freedom of rate competition that results from partial subscribership."²⁴⁴

In *Smith v. Wilker*²⁴⁵ NYFIRO argued that the concept of independent filings under the all-industry legislation presupposes a carrier's terminating its subscribership to a rate bureau for all kinds of insurance and classes of risks embraced in the coverage sought to be filed. The argument was rejected, and the court upheld the determination of the New York superintendent of insurance that a carrier which independently files a broad multiple peril policy may still subscribe to a rating organization for its fire and extended coverage rates. The court pointed out that the fundamental legislative purpose of the all-industry bills was to promote the public welfare without prohibiting or discouraging reasonable competition. The extensive litigation which the

Insurance and Government 338, 358 (Center & Heins eds. 1962), from *In the Matter of the Independent Rate Filings for Dwelling Classes by the N. Am. Cos.*, *confirmed* in *Cullen v. Holz*, 184 N.Y.S.2d 578 (Sup. Ct., App. Div.).

²⁴² Quoted in Mertz at 215.

²⁴³ 83 Ariz. 369, 375, 321 P.2d 1030, 1034 (1958).

²⁴⁴ *Id.* at 375, 321 P.2d at 1034.

²⁴⁵ 198 N.Y.S.2d 268 (Sup. Ct., App. Div.), *appeal denied*, 208 N.Y.S.2d 1025 (Ct. App. 1960).

rate bureaus have engaged in for the last two decades suggests that these organizations seek to prostitute the original purpose of the all-industry bills at the expense of competition and independent action.

In a decision by the Washington Supreme Court²⁴⁶ it was held an insurer may affiliate with a rate bureau to utilize the bureau's research product while making independent rate filings with the state insurance commissioner. This appears to be the ideal function of a rating organization, that is, to gather, organize, and analyze statistical data, which carriers may use to make intelligent, although independent, decisions concerning rates. The benefits of such statistical organizations have been recognized and sanctioned by the federal courts in antitrust proceedings as having a legitimate business purpose. The rate bureau argued that even though free competition may be impeded its data should not be available to independent carriers for only informational purposes since subscribership to a rating organization under the all-industry type legislation means authorizing the bureau to make all filings of the carrier. The court concluded that although the state rating law precluded partial subscribership,²⁴⁷ a company could nevertheless subscribe to the bureau's services for all classes for informational purposes and at the same time make its own filings independently for all such classes.

But the Mississippi Supreme Court construed narrowly the so-called "designation clause" of the Mississippi casualty insurance law.²⁴⁸ This clause permits a company to select whether to file under the casualty rating law or the fire rating law, when both acts are applicable to the proposed coverage, by filing with the insurance commissioner "a designation as to which rate regulatory act" is applicable. The designation clause was held inapplicable to homeowners' policies. Thus the commissioner's rules were sustained forbidding the independent filing of coverage for both fire and casualty insurance with an indivisible premium.

3. Independent Filings and the Aggrieved Party Issue

In 1954, at the same time NYFIRO commenced its long and unsuccessful effort to destroy the right of partial subscribership, that bureau and eight of its members launched an attack on Allstate Insur-

²⁴⁶ *Insurance Co. of N. Am. v. Sullivan*, 56 Wash. 2d 251, 352 P.2d 193 (1960).

²⁴⁷ The statute provided that, except as to certain "grandfather" partial subscribership situations, "an insurer may . . . authorize a rating organization to make all its filings only, and may not make a portion of such filings on its behalf and authorize a rating organization to make other such filings." Quoted in 56 Wash. 2d 251, 252-53, 352 P.2d 193, 194-95 (1960).

²⁴⁸ *Insurance Co. of N. Am. v. Insurance Comm'n*, 237 Miss. 759, 116 S.2d 224 (1960).

ance Company's independent filing of dwelling fire and extended coverage rates in New York. In petitioning the superintendent of insurance for a hearing, NYFIRO alleged that Allstate's rates, which were approximately twenty percent below the bureau's level, were inadequate not only because they were unsupported by individual dwelling experience of that company, but also because if NYFIRO were to file similar rates they would be confiscatory for its member companies. Allstate contested the right of the bureau to a hearing as an aggrieved party.²⁴⁹ In January 1955, the superintendent of insurance issued an opinion concluding that the New York rating law did not accord rating organizations or other competitors the right to a hearing to contest an independent filing.²⁵⁰ NYFIRO appealed, but while the appeal was pending, a new superintendent called a hearing at NYFIRO's request and permitted NYFIRO to be heard. The court therefore ruled that the appeal was moot.²⁵¹ In July 1955, after extensive hearings, the superintendent upheld Allstate's filing, but changed the rate reduction from approximately twenty percent to approximately fifteen percent below the bureau's rates.²⁵² Both parties appealed and the matter was subject to a succession of complicated appeals and cross-appeals for four years before it was finally resolved in 1959 in *Cullen v. Holz*.²⁵³

The New York Appellate Division, in a memorandum decision entered without an opinion, unanimously confirmed the superintendent's order approving Allstate's modified filing, and dismissed NYFIRO's appeal.²⁵⁴ The court stated: "In so holding, it is concluded

²⁴⁹ Two sections of the all-industry bills confer standing upon a class described as "aggrieved." Section 5(d) provides that "Any person or rating organization aggrieved with respect to any filing which is in effect may make written application to the (commissioner) for a hearing thereon" Section 16(a) provides that "Any insurer or rating organization aggrieved by any order or decision of the (commissioner) made without a hearing, may . . . make written request to the (commissioner) thereon. The (commissioner) shall hear such party or parties" See Comment, 58 Mich. L. Rev. 730 (1960).

²⁵⁰ In the Matter of Petition of NYFIRO and Eight Individual Members for a Hearing Relating to the Fire Dwelling Rate Filings of the Allstate Ins. Co., N.Y. Ins. Dep't., Jan. 27, 1955.

²⁵¹ *Cullen v. Holz*, 152 N.Y.S.2d 163 (Sup. Ct. 1956).

²⁵² In the Matter of Independent Filing of Fire Rates by Allstate Ins. Co., N.Y. Ins. Dep't. July 1, 1955.

²⁵³ 181 N.Y.S.2d 163 (Sup. Ct., App. Div. 1958), *aff'd without opinion*, 6 N.Y.2d 971, 161 N.E.2d 392 (1959). For more detailed account of the extensive hearings and litigation in this case, see Hearings, *supra* note 36, pt. 2, 1251-55.

²⁵⁴ 181 N.Y.S.2d 163 (Sup. Ct., App. Div. 1958).

that petitioners are aggrieved parties.”²⁵⁵ This one-sentence conclusion is obviously very narrow in scope. At most it amounts only to a holding that although the superintendent had elected in his discretion to call a hearing and permit the bureau to intervene and become a party, the bureau would be deemed a party aggrieved by the superintendent’s order for purposes of giving the court jurisdiction to rule on the order. It was not held that a bureau has the right to demand a hearing concerning an independent filing in the first instance, or to go to court for relief, if the superintendent does not choose to call a hearing and allow the bureau to intervene.

Also, in 1959, the Virginia Supreme Court of Appeals held that since certain orders relating to insurance rates were not addressed to an agent’s association and neither took nor attempted to take any right, privilege, or property directly from it, the association had no status as a “party aggrieved.”²⁵⁶ The association attempted to contest the validity of an order approving a rate change which involved recomputing the rate base by reducing from twenty-five to twenty percent the allowance for commissions. The requirement imposed by the court of a direct proprietary interest for one to be an aggrieved party should be applicable to determining the status of rate bureaus which challenge independent carriers.

Following this litigation, and therefore somewhat belatedly, several state insurance commissioners noted the necessity of preventing competitors from burdening independence by asserting a status as an aggrieved person.²⁵⁷ One of the primary reasons for the commissioners’ position is that bureaus, claiming to be aggrieved persons do not act on behalf of the public, but rather in defense of their own price structure.²⁵⁸

B. *Contemporary Proposals for Revisions of the Rating Laws*

During 1958-59 the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary conducted a rather exhaustive investigation of state regulation of insurance. Hearings on state regulation of insurance rates were held in 1959.²⁵⁹ The subcommittee recommended measures for strengthening state administrative supervision

²⁵⁵ *Id.*

²⁵⁶ *Virginia Ass’n of Ins. Agents v. Virginia*, 201 Va. 249, 110 S.E.2d 223 (1959).

²⁵⁷ *E.g.*, address of NAIC President Northington, 1959 Proceedings 37, 40; statement of New Hampshire Commissioner Knowlton, Hearings, pt. 3, 1844-45.

²⁵⁸ Hearings, pt. 2, 1262, 1316; pt. 3, 1795, 1835. *See also* McHugh, “Rate Regulation Revisited: A Point of View of a Federal Official,” in *Insurance and Government* 385, 395 (Center & Heins eds. 1962).

²⁵⁹ Hearings, pts. 2-3.

by obtaining more qualified personnel, by increasing budgets of state insurance departments, and the like.²⁶⁰ Recommendations also were made such as eliminating mandatory bureau membership, denying rating bureaus the status of aggrieved persons, eliminating the requirement for annual filings of deviations, and adopting the file-and-use provision.²⁶¹

While the Senate hearings were being conducted, the NAIC decided to hold its own hearings concerning the entire system of state regulation to determine how it could be improved.²⁶² In late 1960, the subcommittee appointed to make the study proposed that the NAIC recommend to the states that rating organizations be denied the status of an aggrieved person, that the annual renewal requirement for deviations be eliminated, and that the fire and casualty bills be consolidated.²⁶³ Almost two years later the NAIC approved amendments to the all-industry legislation, as proposed by its subcommittee, denying the status to rate bureaus of aggrieved persons and modifying the deviation section to allow deviations to remain in effect until withdrawn by the insurer or until otherwise terminated.²⁶⁴ In 1963, the NAIC approved an amendment to consolidate the fire and casualty rating laws to foster the development of multiple line package policies.²⁶⁵ What is significant about these NAIC proposals is that they are a number of years behind principles which the industry was forced to establish in the courts. The NAIC seems not only conservative in its leadership in insurance regulation; it often appears as a reactionary force.

Meanwhile, the increasing emphasis upon competitive rate making from the late 1940's until the early 1960's has not been effected without accompanying problems. For example, in each year from 1962 through 1966 underwriting losses²⁶⁶ have been suffered in the following lines: straight fire, homeowners multiple peril, automobile bodily injury

²⁶⁰ S. Rep. No. 1834, 86th Cong., 2d Sess. 239-47 (1960).

²⁶¹ S. Rep. No. 831, 87th Cong., 1st Sess. 111-29 (1961).

²⁶² See 1961 Proceedings 343-44, 347 for a brief history of the NAIC Subcommittee to Review Fire and Casualty Rating Laws and Regulations.

²⁶³ 1961 Proceedings 346-48.

²⁶⁴ 1962 Proceedings 502-05, 525.

²⁶⁵ 1963 Proceedings 349, 351, 651-52, 654-66. For a discussion of multiple line insurance, see R. Hensley, *Competition, Regulation and the Public Interest in Nonlife Insurance* 107-15; Winter, *The Multiple Line Concept*, in N.Y. State Ins. Dept., *Examinations of Insurance Companies* 527 (1953).

²⁶⁶ Underwriting loss is a statutory figure taken from the annual statements of stock companies, representing a comparison of claim losses and operating expenses incurred with premiums earned. *Best's Fire and Casualty Aggregates and Averages* iv (1967).

liability, and automobile property damage liability.²⁶⁷ Since 1955 the stock companies have incurred an underwriting loss equal to approximately one and one-half billion dollars, with homeowners and automobile liability insurance the chief contributors to the losses.²⁶⁸ The companies have been able to survive only by nearly doubling their premiums, assets, and surpluses. The key to their survival has been their rising investment income. For example, in 1965 the stock companies enjoyed an aggregate one and one-half billion dollar investment profit²⁶⁹ while incurring a four hundred twenty-five million dollar underwriting loss.

These continued underwriting losses have been attributed specifically to (1) sharp price competition precipitated by the deviating and independent companies, driving underwriters to innovations to broaden coverage, and refining classifications and differentials, which have failed to produce underwriting profits; (2) rising claim costs; (3) lagging underwriting experience development; and (4) the reluctance of state authorities to approve rate increases, causing many companies to restrict their underwriting to certain areas and to certain classes of property, giving rise to substandard high-risk companies, some sixty-five of which have failed in recent years.²⁷⁰

²⁶⁷ *Id.* at 18-20, 26-27. Figures for statutory losses of mutual companies are not reported.

²⁶⁸ "Review and Preview," *Best's Fire & Cas. News*, Jan. 1967, at 10.

²⁶⁹ Investment profit is a statutory figure taken from the annual statements of the companies, listing stocks at market value, but bonds not in default at amortized value. *Best's Fire and Casualty Aggregates and Averages* iv (1967).

In every state, except Kentucky, Maryland, and Virginia, property and casualty companies are not required to figure any portion of investment profits into calculations of underwriting losses or profits for the purpose of establishing rates. The principal argument in favor of this practice is that since insurance companies take the risks of investing, they are entitled to the returns. It is reasoned that since policyholders do not make up investment losses, they should not benefit from investment profits through the use of such profits to reduce premiums. The Kentucky insurance commissioner ruled recently that investment profits on unearned premium reserves and loss reserves must be used to offset automobile insurance rate increases. Unearned premium reserves are that portion of the policyholder's payment that has not been "earned" by the company because the policy has some time to run. Loss reserves are monies set aside to pay claims on losses which have arisen, but on which no settlement has been reached. The ruling of the Kentucky commissioner applies only to interest and dividend income from investments; it does not include capital gains or losses. In Maryland, rate adjustments are required to take into account investment profits from unearned premium reserves. In Virginia, it has been held that investment income, if considered at all, should be limited to that produced from investment of unearned premium reserves. The existing practice has been attacked by critics outside the insurance industry. *See Wall St. J.*, Feb. 13, 1967, at 1, col. 6; Feb. 23, 1967, at 5, col. 1 (midwest ed.); Moseley, "Investment Income and Ratemaking," *Best's Fire & Cas. News*, June 1967, at 24.

²⁷⁰ "Review and Preview," *Best's Fire & Cas. News*, Jan. 1967, at 10, 12-13.

The most significant of these reasons for underwriting losses seems to be the political pressures on the insurance commissioners, who frequently prevent meritorious rate increases.²⁷¹ "Wait until this election is over before you ask for approval of your rate increase" appears to be a remark which is frequently made; nor does a commissioner always like to give an increase just after his own election or appointment by a newly elected governor, for the commissioner is trying to "start out well." The failure to secure rate increases creates pressures on companies to withdraw from the market and sometimes jeopardizes a company whose business is concentrated in a frugal state.

As a result of these underwriting losses, the independent insurers have urged the modification of the all-industry laws. The basic plea has been for the enactment of a file-and-use provision in all states. Such a provision permits the immediate use of rates, once filed with the state insurance commissioner; no prior approval is required. The argument in favor of this provision is that it permits the industry to respond to immediate needs and reverses the continued underwriting losses in automobile, homeowners, and fire insurance.²⁷² Thus the deviators and independents now seek to secure rate increases rather than rate decreases as in the past.

The desirability of the file-and-use provision was urged by the Senate Antitrust and Monopoly Subcommittee in its report on the insurance industry.²⁷³ As result of the report, a bill was drafted for the District of Columbia to revise its laws for comprehensive fire and casualty regulation.²⁷⁴ The bill would have eliminated prior approval of rates, although rate filings would have been required. Rate changes were to become effective upon filing. In addition, the bill would have removed the one-year period of effectiveness of rate deviations, compulsory membership in the District's fire rate bureau, and the standing of rate bureaus as aggrieved parties. The purpose of the bill was to provide a model for the states to follow in revising their legislation to

²⁷¹ See Kemper, "The Federal Signposts: Danger Ahead," 1967 *Ins. L.J.* 267; Statement of Insurance Company of North America before the NAIC Subcommittee of the Rates and Rating Committee, 1965 Proceedings 569-78; Hearings, pt. 2, 1206.

²⁷² See statement of Insurance Company of North America before NAIC Subcommittee of the Rates and Rating Organizations Committee, 1965 Proceedings 569-78.

²⁷³ S. Rep. No. 831, 87th Cong., 1st Sess. 117-19 (1961). The arguments in favor of the file-and-use provision are summarized at page 118 of the report.

²⁷⁴ S. 2907, 86th Cong., 2d Sess. (1960). For a discussion of the bill, see Dineen, Procter & Gardner, "The Economics and Principles of Insurance Supervision," in *Insurance and Government* 1, 34-36 n.81 (Center & Heins eds. 1962); McHugh, "Rate Regulation Revisited: The Point of View of a Federal Official," in *Insurance and Government* 385, 411-17 (Center & Heins eds. 1962).

eliminate the criticism of state regulation made in the Senate reports on the insurance industry.²⁷⁵

No action was taken on the bill in the 86th Congress. It was reintroduced in 1961;²⁷⁶ again no action was taken. In 1963, Senator Kefauver reintroduced the bill²⁷⁷ and urged its enactment,²⁷⁸ but no action was taken. Since 1963 the bill has not been reintroduced.

Some observers are concerned that a file-and-use provision would not constitute state regulation within the meaning of the proviso of section 2(b) of the McCarran Act. Basically these fears arise from the statement in 1944 of Attorney General Biddle that the practice in those states which simply permit rate bureaus to fix rates comes in conflict with federal law. He observed that if the states wished to be free of the antitrust laws they must assume responsibility for actually fixing rates or approving rates filed with them; otherwise the public is not protected.²⁷⁹ However, in 1962, the Department of Justice supported the proposed amendments to the District of Columbia law²⁸⁰ and referred to the California regulatory system, which does not even require advance filing of rates, as providing an atmosphere under which the insurance industry thrives without a single failure due to inadequate rates. The question remains whether the present attorney general and his successors would consider the file-and-use provision as tantamount to state regulation. To date no one has attacked the provision in those states where it has been enacted.²⁸¹

The California and Idaho regulatory schemes differ significantly from the all-industry regulatory pattern. Under California law advance filing or approval of rates is not required; rates are not deemed excessive unless there is a lack of competition; and rates are not deemed inadequate unless the insurer's solvency is threatened or low rates are used in concert to force a monopoly.²⁸² The theory is that competition will keep rates down without the commissioner's meddling. The greedy insurer will lose the business to his thriftier competitor;

²⁷⁵ S. Rep. No. 831, 87th Cong., 1st Sess. (1961); S. Rep. 1834, 86th Cong., 2d Sess. (1960).

²⁷⁶ S. 568, 87th Cong., 1st Sess. (1961).

²⁷⁷ S. 1184, 88th Cong., 1st Sess. (1963).

²⁷⁸ 109 Cong. Rec. 4787-88 (1963).

²⁷⁹ Joint Hearings *supra* note 58 at 638 (1944).

²⁸⁰ Statement of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice, before the Subcommittee of Business and Commerce on the District of Columbia, Press Release, June 21, 1962, at 1.

²⁸¹ Delaware, District of Columbia (casualty), Maine, Massachusetts (except compulsory automobile liability insurance), Ohio (casualty), and Wyoming.

²⁸² For comments on the California and Idaho regulatory schemes by the insurance departments of those states, see 1966 Proceedings 487-95.

and it is apparent that the public is sufficiently protected against excessive rates. The California and Idaho laws have never been tested in court so the possibility exists that these laws do not regulate within the meaning of the McCarran Act.

The urging by insurance companies for elimination of the prior approval provision of the all-industry laws has not impressed the state insurance commissioners. In 1965, the NAIC submitted a questionnaire to commissioners in fifty-four jurisdictions; forty-seven responded.²⁸³ Thirty-two commissioners felt that a file-and-use provision would not be desirable, and forty believed that the California type of "no filing" provision would be undesirable, mainly because it would precipitate "cutthroat competition," although twenty-nine commissioners admitted that they were not familiar with the California statute. The purpose of the questionnaire was to furnish data for the NAIC's Rates and Rating Organizations Subcommittee's study of state rate regulation, designed to determine whether rate regulation is working in the manner intended at the time such legislation was adopted.²⁸⁴ The subcommittee had been urged by the insurance industry to propose a major overhaul of the rate regulatory laws.²⁸⁵

The results of the questionnaire indicate that there is not much unanimity of opinion regarding changes that might be made, and often the responses seemed inconsistent. Ninety-one percent of the jurisdictions indicated that their present laws allowed price competition; eighty-seven percent indicated that their laws allowed service competition; eighty-three percent believed that their rates and rules met the statutory standards with respect to all lines of insurance or types of risks. Yet only nineteen percent of the commissioners felt that they had an adequate staff of actuaries or other rating experts, and forty-nine percent indicated that their departments do not have sufficient information to determine the accuracy of statistics contained in rate proposals.

Apparently the NAIC subcommittee is still studying the results of the questionnaire, for in June 1966, the subcommittee adopted a motion to continue its analysis of the answers and to continue its study of rates, rating organizations, and rating laws.²⁸⁶

Barring amendment of rating laws to permit immediate use of rate filings, the number of rate cases will undoubtedly increase. The president of Home Insurance Company, a large property and casualty in-

²⁸³ The questionnaire and tabulated results appear in 1966 Proceedings 447-49, 471-86.

²⁸⁴ 1965 Proceedings 200.

²⁸⁵ 1965 Proceedings 566-67.

²⁸⁶ 1966 Proceedings 446.

suror, has said that many people in the industry hold the view that in some states it is next to impossible to receive favorable action on rate increases when an election is in the offing, and recourse in court involves a lengthy delay before relief can be secured. During this inevitable delay, companies continue to suffer from inadequate rates. As a result, the tendency in the past has been to compromise on unprofitable rates. Now it is realized that despite the delay, the companies must resort to the courts to receive rate adjustments as dictated by the statistics.²⁸⁷

And while the NAIC has failed to recommend statutory changes to assure greater flexibility in insurance rate making, in 1966 three independent studies urged such flexibility. At the request of the Virginia State Corporation Commission, a New York actuarial firm conducted a study of passenger car liability insurance. It recommended open competition as the simplest formula for rate regulation. In Florida, the insurance commissioner appointed a committee of businessmen to investigate and report on automobile safety and insurance rating. The group concluded that a file-and-use measure would generate competition and stabilize rates by eliminating the need for large annual increases. At the same time the group affirmed the need for rate bureaus as the collectors, verifiers, and transfer agencies of experience from the individual company to the state insurance department. The Public Affairs Research Council of Louisiana, a private research group made up of legislators, educators, businessmen, labor people, and others recommended that Louisiana permit speedy implementation of rate changes and more flexibility in the rate structure by adopting the file-and-use method for both rates and classes of automobile and dwelling insurance.²⁸⁸

IX. CONCLUSION

An atmosphere favorable to the intervention of Congress into the emaciated state regulatory pattern is becoming more apparent. For example, as a result of the 1965 Senate hearings on the substantial number of failures of high risk automobile insurers,²⁸⁹ legislation was introduced in the first session of the 90th Congress to establish a

²⁸⁷ See United States Investor, Jan. 3, 1966, at 36.

²⁸⁸ Subsequently, Louisiana adopted a modified version of the file-and-use rate provision, under which rates are effective when filed as long as there are no changes in classifications or expense factors. "Significant Studies Advocate More Flexibility in Insurance Rating," *Best's Fire & Cas. News*, Oct. 1966, at 10.

²⁸⁹ Hearings, *supra* note 36, pt. 12.

federal motor vehicle insurance guaranty corporation.²⁹⁰ An exhaustive investigation of the automobile insurance industry is being prepared with the effectiveness of state regulation of rates one of the topics for study.²⁹¹ Among the recommendations of the investigation may be the control of automobile insurance by the federal government in conjunction with its asserted jurisdiction over matters concerning automobile safety. In addition, a recent staff study of automobile insurers by the House Judiciary Committee concludes that existing state regulation of rates is inadequate. The report calls for a further investigation by the FTC.²⁹²

State regulation of the property and casualty insurance business in the United States represents a rather unique history of the relationship between the responsibilities of the states and the federal government. Since 1868, except for a brief nine-month period in 1944-45, insurance has been virtually immune from federal regulation. Following the *SEUA* decision in 1944 the regulatory power of the states was reaffirmed by legislative fiat. The states were afforded the opportunity to demonstrate their ability to implement a model program demonstrating the states' ability to deal with an industry whose activities have interstate implications. Today the states are still struggling to provide adequate, effective regulation, but the concern continues to be focused on legislation. In the last few months numerous bills have been introduced concerning rate regulation.²⁹³ There are some indications that the absence of underwriting profits and the companies' restrictions on the lines and types of business they write will precipitate legislation aimed at securing adequate rates and broadening the availability of

²⁹⁰ E.g., S. 688; H.R. 4004-08, 90th Cong., 1st Sess. (1967). See Dineen, Procter & Gardner, "The Economics and Principles of Insurance Supervision," in *Insurance and Government* 1, 53-55 n.140 (Center & Heins eds. 1962), for forty-one activities of the federal government in connection with insurance. Senator Young of Ohio has called for repeal of the McCarran Act and the complete return of insurance regulation to the federal government. Kemper, "The Federal Signposts: Danger Ahead," 1967 *Ins. L.J.* 267, 271-72.

²⁹¹ *Newsweek*, July 17, 1967, at 69; August 21, 1967, at 54.

²⁹² *Wall St. J.*, Oct. 18, 1967, at 8, col. 2 (Midwest ed.).

²⁹³ Bills have been introduced in Connecticut, Florida, Georgia, Illinois, Indiana, Maryland, Massachusetts, New York, North Dakota, Oregon, and South Dakota aimed at revising rate regulatory patterns, including such proposals as creating a state rate bureau to assist in fixing and establishing reasonable premium charges for compulsory vehicle liability insurance; providing for immediate open filing of rates, rate plans, rate classes, and modifications for casualty and surety insurance; authorizing the state superintendent of insurance to approve assigned risk plans for fire insurance; and completely revising the regulatory system in fire, casualty, and surety rates. For a synopsis of the bills see "What the Legislatures Are Doing," 1967 *Ins. L.J.* 43-48, 110, 113, 182-83, 236, 366-68, 433, 490-91.

insurance to parties representing high risks. Intense rate competition will not be allowed to flourish in a regulatory atmosphere which fosters insolvencies, growing selectivity of risks, and voluntary withdrawal from certain markets as has recently occurred in some jurisdictions. Legislation is not the panacea although one may wish to believe that it is or should be. Also, the genesis of the all-industry bills demonstrates that too many powerful special interests are concerned with state regulatory legislation for it to reflect the efficacious implementation of meaningful goals.

State regulation can grow in stature and achieve freedom from political subservience. Such regulation must have as its foundation sound administrative regulation where by reasoned argument and actuarial proof it can successfully control and direct competition in the public interest. Whether this is possible at the state level where the staffs, budgets, and levels of expertise are meager in relation to the burdensome responsibility is questionable. A real and growing possibility exists that unless the states adequately regulate rate making promptly, the federal government will assume administrative control of the field. Such entry will undoubtedly lead to its virtual total occupation and conceivably to appropriation of the substantial insurance tax revenues which now go largely to the states.